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Brf. of Thorndike for P. E.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1900

No. 213

WILLIAM B. TYLER . . . PLAINTIFF IN ERROR

v.

THE JUDGES OF THE COURT OF REGISTRATION . . . . DEFENDANTS IN ERROR

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE PLAINTIFF IN ERROR

J. L. THORNDIKE
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This case was a petition by the Plaintiff in Error for a writ of prohibition to the Judges of the Court of Registration in Massachusetts to prohibit them from proceeding further in registering the title to a certain parcel of land and determining the boundaries between it and an adjoining piece of land belonging to the Plaintiff in Error.

The grounds of the petition were that the Massachusetts act of 1898, c. 562, called the Land Registration Act, under which the proceedings complained of were had, was contrary to the Constitution of the United States, as well as to that of Massachusetts, (1) in that it gave to decrees for the original registration of land the effect of depriving persons of their property without due process of law, and (2) in that it gave to the acts of the recorder and assistant

recorder in subsequent dealings with registered land a like effect; also that the act was otherwise contrary to the State Constitution; and that, these provisions of the act being essential parts of the system intended to be established by it, their invalidity rendered the whole act invalid.

The provisions of the act are set out in full in the Appendix, *post*, p. 75.

The purpose of the act is to obtain an absolute certainty as to the title acquired upon every transfer of registered land or any interest in it, and by this means to do away with the necessity of examining the title upon every transfer.

In order to effect this purpose the title of each applicant for registration is investigated in a judicial proceeding, with certain provisions for notice as hereinafter mentioned, and, if his title is found to be a good one, he is registered by a decree of court as the owner of the land. The decree conclusively quiets his title and excludes the claims of all other persons. After such registration a purchaser from the registered owner need not concern himself to look into the previous title, but may rely absolutely on the conclusive effect of the registration.

Subsequent transfers of the land are effected only by entries made by a recording officer in the register, with the actual or presumed assent of the registered owner. These entries have a like conclusive effect against the previously registered owner and all persons claiming under him, and a purchaser from any one that appears by such an entry to be the owner may rely absolutely on the entry in the register without further inquiry.

The examination of the title of a registered owner previous to the entry of his ownership on the register is by this means entirely done away with. In any dealings with the land it is only necessary to examine the entries, if any, that may have been made after he was registered as owner. His title cannot be incumbered or affected otherwise than by such entries, and all prior claims are excluded by the original registration and the subsequent entries.

While a purchaser of registered land thus obtains a title that cannot be questioned, he may be deprived of it without any fault of his

n, by a subsequent entry in the register procured by fraud or de by mistake of the recording officer. Persons thus deprived of y interest in land after its original registration are provided with mpensation out of an assurance fund. No such compensation is ovided for those that are deprived of any interest by the original gistration, as they are supposed to have an opportunity of assert- g their claims in the investigation that precedes that registration.

The manner prescribed by the act for obtaining the original regis- ation is by a judicial proceeding in the Court of Registration to uiet the title of the applicant.

His first step is filing an application to the court to have his title egistered and confirmed (ss. 20, 21), and upon filing it he is required o file also in the registry of deeds a memorandum stating the appli- ation and the date and place of filing and the description of the and (s. 20). The application is signed and sworn, and must con- ain, among other things, a description of the land, and the names nd addresses of the adjoining owners and occupants, if known, or a statement of what search has been made to find them; and the pre- scribed form of application contains a statement that the applicant does not know of any mortgage or encumbrance, or that any other person has any estate or interest in the land other than such as are set out in the application (s. 21).

Upon the filing of the application it is referred to one of the exa- miners of title, who examines the title and certifies to the court his opinion upon it (s. 30).

If the examiner's opinion is favorable, or if the applicant elects to proceed further after an adverse opinion, a notice is published in a newspaper, addressed to all persons (by name) known to have an adverse interest, and the adjoining owners and occupants (by name) so far as known, and "to all whom it may concern," and citing them to appear and show cause why the application should not be granted (s. 31). A copy of the notice is also sent by registered mail to every person named in it whose address is known, and a copy is posted in a conspicuous place on the land (s. 32).

At the time fixed in the notice any person claiming an interest may appear and show cause (s. 34), and in default of appearance

the court may order a general default to be recorded and the application to be taken for confessed. It is provided that, "by the description in the notice, '*to all whom it may concern*,' all the world are made parties defendant and shall be concluded by the default and order" (s. 35).

A survey may be ordered for the purpose of determining boundaries, and the court may order durable bounds to be set (s. 36).

If the court finds that the applicant has not a title proper for registration, his application is dismissed (s. 37). But, if it is found that his title is proper for registration, then a decree of confirmation and registration is entered (s. 38), which contains a description of the land as finally determined by the court, and sets out the estate of the owner and all particular estates and encumbrances to which the land or the owner's estate is subject (s. 40), and a certificate of title is issued in accordance with it (s. 41).

It is provided (s. 38) that "every decree of registration *shall bind the land and quiet the title thereto*, subject only to the exceptions" of certain public rights and leases for not more than seven years, and "*shall be conclusive* upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice, or citation, or included in the general description 'to all whom it may concern.' Such decree shall not be opened by reason of" any disability, "nor by any proceeding at law or in equity for reversing judgments or decrees, subject however to the right of *any person deprived of land* or any estate or interest therein by a decree of registration obtained *by fraud*, to file a petition for review within one year after the entry of the decree, *provided* no innocent purchaser for value has acquired an interest," but if there is any such purchaser, the decree shall not be opened and shall remain in force, subject only to a right of appeal within 30 days from the date of the decree as provided by s. 14.

After registration, the same dealings may be had with land as if it had not been registered, but the instrument used for the purpose operates only as a contract and as authority for registration by the recorder or assistant recorder, and the registration by him is "*the operative act* to convey or affect the land" (s. 50).

presentation of a conveyance, with the owner's duplicate cer-
e, to the assistant recorder, he is to cancel the certificate and
a new certificate to the grantee for the land conveyed, and, if
part is conveyed, a new certificate to the grantor for the residue
57, 58).

ortgages (s. 61) and all interests less than an estate in fee
le (s. 52) are registered by a memorandum made by the assis-
recorder on the certificate upon presentation to him of the instru-
creating such interest.

ssignments, extensions, and discharges of mortgages are made
ubstantially the same manner, the mortgagee's duplicate certifi-
being produced instead of the owner's (s. 62).

he production of the owner's duplicate, when an instrument is
sented for registration, is conclusive authority for the recorder or
stant recorder to issue a new certificate or make a memorandum
accordance with the instrument, and the *new certificate* or *me-
randum* is binding upon the registered owner and all claiming
der him in favor of bona fide purchasers (ss. 55, 39), except in
case of a registration obtained by *forgery after* the original
istration (s. 55).

Where the assistant recorder is in doubt upon any question, or
ere any party in interest does not agree as to the proper memo-
ndum to be made, the question is to be referred to the court
. 53).

Any person *deprived* of any interest in land *after* the original
gistration by the registration of any other person as owner of any
terest through *fraud* or in consequence of any *error, omission,
istake, or misdescription* in any certificate or entry or memorandum,
provided with compensation out of the assurance fund (s. 96).

In the proceedings for registration complained of in the present
se, the application had been referred to an examiner and he had
eported favorably to the title of the applicants for registration
Trans. p. 13), and a notice to adjoining owners and occupiers
herein named and "*to all whom it may concern*" had been pub-
ished and sent by mail (*Id.* p. 17) and posted on the land (*Id.* p.
18), according to ss. 31, 32.

The Plaintiff in Error then filed his petition in the Supreme Judicial Court setting out the proceedings, and alleging that the Court of Registration intended to proceed at the time and place specified in the notice to determine all matters relating to the title of the applicants to the parcel of land described in their application, and, among other matters, to determine the boundary between it and the land of the Plaintiff in Error, part of which, as he claimed, was included within the boundaries claimed by the applicants. And he prayed a prohibition on the ground that the act was contrary to the Constitution of the United States and to that of the state as above mentioned and so gave no authority to the Court of Registration to determine such questions (*Trans.* p. 3–6).

An answer was filed (*Id.* p. 7), substantially admitting the allegations of the petition and alleging that the proceedings for registration had been continued to await the decision in this case. A copy of the proceedings for registration was filed with the answer as part of it (*Id.* p. 9.)

The question of the constitutionality of the act was thereupon reserved for the determination of the full court (*Id.* p. 29), and a decree was afterwards made, in accordance with the decision of a majority of the court, declaring that the act was valid and not repugnant to the Constitution of the United States or that of the state in any of the respects above mentioned, and therefore denying the prayer for a writ of prohibition, and directing that the petition stand dismissed (*Id.* p. 30).

The opinion of the majority of the court was delivered by *Holmes*, C. J. (*Trans.* p. 32); *Lathrop* and *Loring*, JJ., dissented and their opinion was delivered by the latter (*Trans.* p. 39, 56; 175 Mass. 71).

The errors assigned (*Trans.* p. 31) are

(1) That it was decided in and by the said decree that the provisions of the Land Registration Act therein mentioned and amendments thereof, whereby a decree of registration is made conclusive upon and against all persons as therein provided, were valid and not repugnant to the Constitution of the United States, whereas

ought to have been decided that the said provisions were not alid and were repugnant to the provision of the said Constitution at no state shall deprive any person of property without due rocess of law:

(2) That it was decided in and by the said decree that the provisions of the said statutes relating to transfers and dealings with egistered land after original registration were valid and not repugant to the Constitution of the United States, whereas it ought o have been decided that the said provisions were not valid and ere repugnant to the provision above mentioned of the said 'onstitution;

(3) That the prayer of the petition was denied by the said ecree, whereas a writ of prohibition ought to have been thereby ranted as in the petition prayed.

Conclusive Effect of Original Registration.

1. The *First Objection* to the validity of the act is, that the riginal registration, which deprives all persons, except the registered owner, of any interest in the land, is obtained without due process of law as against *residents* within the jurisdiction of the court that might have been served with notice there, and as against *non-residents* that are not named or described in the published notice, unless notice actually reaches them.

The Ohio registration of title act of 1896, which was similar to the Massachusetts act, was held to be contrary to the Constitution on this ground, in *State* v. *Guilbert*, 56 Ohio St. 575.

The Illinois act of 1897, which went on a different principle, was held to be valid, in *People* v. *Simon*, 176 Ill. 165, 179, on the ground that persons without notice were not concluded by the decree and were barred only by the limitation of time prescribed in it, and the court expressed concurrence in the Ohio decision as to the point above mentioned.

NATURE OF PROCEEDINGS.

The proceedings for obtaining registration are in form and substance proceedings to quiet the title of the applicant. They may be instituted by any person or persons *claiming* to own or to have the power of disposing of the legal estate in fee simple (s. 19), whether they are in possession or not. The form of application set out in s. 21 requires them to specify (3) all persons known to them to have any estate or interest in the land, and (5) the occupants of the land. The names of persons known to have an adverse interest are to be inserted in the notice (s. 31), and, by the words in the notice, "to all whom it may concern," all other persons having or claiming an adverse interest are made defendants (s. 35).

All persons having any possible claim adverse to that of the applicant are thus united as defendants to the application. The relief prayed by the applicant as against them is that his title may be confirmed (s. 21, form), and if he is successful the decree quiets the title conclusively against them, whether they are mentioned by name or included in the general description (s. 38).

These proceedings, like other statutory proceedings to quiet title, are in the nature of a suit in equity against all adverse claimants that are not in actual possession, whether the applicant is in possession or not. This is established by the case of *Holland* v. *Challen*, 110 U.S. 15, where a suit in equity was maintained in the U. S. Circuit Court by a plaintiff not in possession for the purpose of quieting his title in accordance with a Nebraska statute. As against adverse claimants in actual possession, it would seem from the same case (p. 25) that the proceedings are in the nature of an action at law to try the title. If several adverse claims exist, the proceedings have the effect of as many different suits in equity or actions at law as there are claims, all of which are instituted by the application for registration.

It is submitted that these proceedings, both as to the persons named in them as adversely interested and those made defendants by the general words of the notice, are proceedings *against persons*, like any suit in equity or action at law for the same purpose.

They appear to have been so considered by a majority of the court below, who were unwilling to treat them as proceedings *in rem*, or to admit the power of the legislature, by changing the form of proceeding from that of a suit *in personam* to that of a suit *in rem*, to avoid the necessity of giving actual notice where it had been previously necessary (*Trans.* p. 37). The sufficiency of the process will therefore be first considered here on the assumption that the proceedings are *in personam*. Afterwards the questions will be considered, whether they can be regarded as belonging to that kind of proceedings *in rem* in which actual notice to the persons interested is not required, and whether the legislature has the power, by employing a new form of proceeding (*in rem*) in such cases, to dispense with the notice that would have been necessary if the old form (*in personam*) had been used.

PROVISIONS FOR NOTICE.

The act provides for notice in three ways, viz., (1) by publication in a newspaper (s. 31), (2) by posting in a conspicuous place on the land, and (3) by registered letter (s. 32).

It is evident, as pointed out by *Loring*, J. (*Trans.* p. 40-41), that all of these notices may be given without any one of them coming to the attention of the person adversely interested.

As to the notice posted on the land, the chances are against his seeing it in the usual cases where the applicant for registration is in possession. In other cases, the notice may be removed immediately after the departure of the officer that posted it, and, if the premises were a house, even the occupant might never know of the notice. But the premises may be a forest or large field, and the conspicuous place in it may be some place in it where he would never go.

The registered letter may not reach the person to whom it is addressed, and his name may be attached to the receipt without his knowledge, or the receipt may be signed by some other person in his own name without the letter actually reaching the person to whom it is addressed, or the letter may have been sent to a wrong address and received by another person of the same name. It may be received at his residence or place of business in his absence, and forwarded without reaching him. What is not unlikely to happen is

that the registered letter will not be sent at all, because the person adversely interested is not mentioned in the application. The applicant may have been ignorant of the adverse interest, though it might have been easily known. He may have just purchased on the terms that the sale should be rescinded if the title should not pass the Court of Registration, and consequently would have had no occasion to inform himself of the state of the title. He may have believed, or thought he believed, that no such interest existed, although he knew the circumstances out of which it arose. The affidavit to the application (s. 21) would not be an obstacle in such cases. Then too he may intentionally have omitted to mention the adverse interest.

But notwithstanding the person adversely interested has no notice of the proceedings, even where he is within the jurisdiction and known and the notice is not sent or does not reach him, the act makes the decree conclusive against him. This is done, not for the benefit of the applicant alone, but in order to carry out the purpose of the act that the decree may be absolutely relied on in all subsequent dealings with the title. It therefore provides that all persons, whether mentioned by name or not in the notice, shall be included in the description "to whom it may concern" and be concluded by the decree (ss. 35, 38). The decree is subject to an appeal only within 30 days from its date (s. 14), and it cannot be set aside otherwise, except for fraud in obtaining it, in which case a petition for review may be filed within a year, but this cannot be done if an innocent purchaser for value has acquired an interest in the meanwhile (s. 38). A decree for registration might be obtained by means of a forged deed or a forged discharge of a mortgage without any notice to the true owner or the mortgagee, and after the lapse of 30 days it would be impossible for him to recover the land from a bona fide purchaser.

INSUFFICIENCY OF NOTICE BY ADVERTISEMENT.

As to all persons adversely interested that do not receive actual notice of the proceedings, there is no process of law or notice whatever, except the advertisement in a newspaper addressed "to all whom it may concern." The question is, in the first place, whether this is a sufficient process where the persons to be concluded by the

decree are known and *within the jurisdiction* and can be actually served with notice.

The following cases are authorities that such an advertisement is not due process of law as regards such persons.

Webster v. *Reid*, 11 How. 437, 459.

Brown v. *Levee Commissioners*, 50 Miss. 468.

Bardwell v. *Collins*, 44 Minn. 97.

State v. *Guilbert*, 56 Ohio St. 575.

People v. *Simon*, 176 Ill. 165, 177-8.

SUBSTITUTED SERVICE.

It is not questioned that a state may provide for determining all questions regarding the title to property within its limits, or for disposing of any other matter within its jurisdiction, although the defendant may, by reason of absence or otherwise, be beyond the reach of process. In such cases of necessity, a substituted service by publication or any reasonable method of imparting notice may be resorted to.

Arndt v. *Griggs*, 134 U.S. 316.

So too the defendants may be persons that for some reason cannot be ascertained, and a general description such as "heirs of A.B. or such persons as shall become the heirs or appointees of A.B. a living person" may be authorised, as was done by the Massachusetts statute (1897, c. 522) applied in *Loring* v. *Hildreth*, 170 Mass. 328.

An extreme case where the rule of necessity was invoked is that of *Shepherd* v. *Ware*, 46 Minn. 174. Judgment had been obtained after service by publication in a previous action to determine adverse claims to land against a defendant named and "all other persons or parties *unknown* claiming any right." The addition of these general words was authorised by a statute. When the action was commenced, the defendant that was named had already parted with the land, but the conveyance was not recorded. The court held, apparently with doubt, that the statute was valid, but its provisions must be strictly followed and reasonable diligence must be used to ascertain such parties as were known. As this appeared to have been done, the judgment was held to be valid as against the

grantee. The principle upon which the case was decided was thus stated, "The legislature may in its discretion provide for substituted service in case of necessity or where personal service is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court."

Effect has also been given to statutes authorising notice by publication in the case of *unknown* persons that could not be discovered by due diligence in Ohio (*Sullivant* v. *Weaver*, 10 Ohio 275) and in Mississippi (*Belcher* v. *Mhoon*, 47 Miss. 613).

These are exceptional cases, justified only by the necessity of preventing a failure of justice where the court has jurisdiction of the matter and the adverse party is not within reach of its regular process. But where the necessity does not exist, the ground of the exception fails. This is shown by these decisions in the three states last mentioned: *Brown* v. *Levee Commissioners*, 50 Miss. 468; *Bardwell* v. *Collins*, 44 Minn. 97; *State* v. *Guilbert*, 56 Ohio St. 575.

FUNDAMENTAL RIGHTS.

There is no question of forms of proceeding or of process. Nobody doubts that forms may be changed to any extent, provided that fundamental rights are not impaired. The only question is what rights are fundamental. The extent to which changes may be made without disturbing such rights is illustrated by such cases as *Hurtado* v. *California*, 110 U.S. 516, and *Maxwell* v. *Dow*, 176 U.S. 581.

Matthews, J., in *Hurtado* v. *California*, 110 U.S. p. 530–1, in an eloquent passage asserted the power of our legal institutions in their growth to adapt themselves to new forms and processes, consistently with the use of due process of law.

"But," he says (p. 535), "it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general

law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'"

And at p. 536, he continues,

"The Supreme Court of Mississippi in a well-considered case, *Brown* v. *Levee Commissioners*, 50 Miss. 468, speaking of the meaning of the phrase 'due process of law' says: 'The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. It refers to certain fundamental rights, which that system of jurisprudence, of which ours is a derivative, has always recognised. If any of them are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by due process of law.'"

In *Holden* v. *Hardy*, 169 U.S. p. 389, it is said,

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as, that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence."

It is also expressly recognized in unambiguous terms, in *Hagar* v. *Reclamation District*, 111 U.S. p. 708, and *Iowa Central Ry. Co.* v. *Iowa*, 160 U.S. p. 393, that a right to *notice* and an opportunity to be heard are fundamental rights secured by the requirement of due process where life or liberty or the title of property is involved.

DECISIONS AS TO REQUIREMENT OF NOTICE.

Upon these principles, this Court held in *Webster* v. *Reid*, 11 How. 437, that a valid judgment could not be obtained against the owners of certain lands in the territory of Iowa, called the half-breed lands, where there had been no other service of process than a statutory notice of publication addressed "*to the owners of the half-breed lands lying in Lee County.*" A territorial statute had provided that the commissioners under an act for the partition of certain lands of half-breed Indians, commonly called the half-breed lands,

might commence actions for their several accounts against t owners, and give eight weeks' notice to them by publication, a upon trial and allowance of their accounts have judgment for t amount and costs, which should be a lien on the lands, and that t words "owners of the half-breed lands lying in Lee County" sho be a sufficient designation of the defendants. Judgments havi been obtained and enforced against the land, this Court held t they were void, saying (p. 459):

"By the act under which the suits were instituted, no other designati of the defendants was required than 'Owners of the half-breed lands ly in Lee County.' These suits were not a proceeding *in rem* against t land, but were *in personam* against the owners of it. Whether they resided within the territory or not does not appear, nor is it a matter of a importance. No person is required to answer in a suit on whom proc has not been served, or whose property has not been attached. In t case there was no personal notice, nor an attachment or other proceedi against the land until after the judgments. The judgments therefore a nullities and did not authorise the executions on which the land was sol

This case is a direct authority that, in proceedings *against pers* residing within the jurisdiction, personal notice is necessary a notice published in a newspaper is not sufficient to support judgment, although the judgment would have been a lien up certain specified land.

In *Brown* v. *Levee Commissioners*, 50 Miss. 468, the levee co missioners had bought certain lands sold for levee taxes and filed bill in accordance with an act of 1872 against "*all persons having claiming any interest, either legal or equitable, in and to the lan herein described*," as defendants, without naming any individua praying a sale of the lands or those parts against the sale of whi no good cause was shown. Notice was published under this tit requiring all persons having or claiming interest to show cause, &c in accordance with the act, and a decree was made, reciting t publication and that no cause had been shown, and directing a sal The court held that the act was unconstitutional and the decree invali The judgment contains a full discussion of the meaning of the e pression *due process of law*, and the nature of remedies betwe parties, of those touching both the person and the thing, and tho

purely *in rem*, and the kinds of process required in each class (p. 478-483). After using the language concerning fundamental rights quoted in *Hurtado* v. *California*, 110 U.S. p. 536 (*supra*, p. 13), *Simrall*, J., said (p. 482),

"Whilst 'processes' are in the power of the legislature, it must respect that ancient and fundamental right which has always belonged to parties sought to be charged in their persons and property, that they shall have *notice* of the suit. Courts of common law and equity cognisance have always exacted *personal notice*, if practicable, that is, if the defendant was commorant within the territorial jurisdiction, and if he could be found. But in order to prevent a failure of justice, *ex necessitate*, if personal notice could not be given, an inferior mode, such as in the wisdom of the legislature might be thought likely to impart actual notice, has been allowed, — such as leaving a copy of the summons with a member of the defendant's family, or affixing it to the door of his domicil, and in certain cases by publication in a newspaper."

The court concluded that the statute authorising the proceedings was in contravention of the Constitution for several reasons, and among them (p. 488),

"Because it expressly denies *personal service* of process upon the defendants, when it is evident that many, perhaps most of them, are residents of the county and state, and amenable to such process."

In *Bardwell* v. *Collins*, 44 Minn. 97, which was an action to enforce a mechanic's lien, alleging that the defendant Collins claimed an interest, the only service was by publication according to a statute authorising service by publication on all parties against whom no "personal judgment" was sought, where the action was to foreclose a mortgage or to enforce a lien on real estate. Judgment having been given against him by default, he moved to set it aside for want of service of process, and it was held that the statute was unconstitutional. The judgment follows closely the reasoning in the case last mentioned. Regarding the cases in which the statute was applicable it is said by *Mitchell*, J. (p. 100),

"We think it clear that the expression 'personal judgment' is here used in the sense of a money judgment for the mortgage debt; and while the legislation on the subject, as we have narrated it, has been rather incongruous in some respects, and while we have been unable to discover where

the commissioners who prepared the Revision of 1866 found any precedent for so radical a departure from the universal course of judicial procedure from time immemorial, and while we are unable to conceive what considerations induced them to adopt it, yet its plain and unequivocal language compels us to the conclusion that this statute was intended to provide that service of the summons by publication might be made on all defendants in foreclosure suits whom it was not sought to hold personally liable for the mortgage debt, although residents of the state, and personal service might be made on them within its jurisdiction."

The court then proceeded to consider the validity of such service (p. 101),

"The only remaining question therefore is whether it is competent for the legislature to authorise such service in such actions upon residents of the state personally present and capable of being found and personally served within its jurisdiction. Is such service 'due process of law'? In determining this question, it becomes important first to consider the character of an action to foreclose a mortgage. It is not an action *in rem*, but *in personam*. . . . Next, it is not only an action *in personam*, but is also strictly judicial in its character, proceeding according to the due course of the common law, like any other ordinary action cognisable in courts of equity or common law. These facts are important for the reason that what would be due process of law in one kind of proceeding might not be such in another, for reasons that will be alluded to hereafter.

"No court has ever attempted to give a complete or exhaustive definition of the term 'due process of law,' for it is incapable of any such definition. All that can be done is to lay down certain general principles and apply these to the facts of each case as they arise. Mr. Webster, in his argument in the Dartmouth College Case, gave an exposition of the words 'law of the land,' and 'due process of law,' which has often been quoted by the courts with approval, viz.: 'The general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.' In judicial proceedings, 'due process of law' requires *notice*, hearing, and judgment. It does not mean, of course, the general body of the law, common and statute, as it was at the time the Constitution took effect, for that would deny to the legislature the power to change or amend the law in any particular. Neither, on the other hand, does 'the law of the land' or 'due process of law' mean anything which the legislature may see fit to declare to be such, for there are certain fundamental rights which our system of jurisprudence has always recognised, which not even the legislature can

gard in proceedings by which a person is deprived of life, liberty, or erty, and one of these is notice before judgment in all judicial proceed- . . . In proceedings *in rem*, as in admiralty and the like, where the ess of the court goes against the *thing*, which is in the custody of the t and is technically the defendant, and persons are not made parties to uits but come in rather as intervenors, it is not essential to the juris- on that persons having an interest in the thing to be affected by the ment should have personal notice of the proceeding, or in fact any other e than such as is implied in the seizure of the thing itself. There are r proceedings in the nature of proceedings *in rem*, many of them not tly judicial, and none of them proceedings according to the course of the mon law, such as the probate of wills, administration on the estates of ased persons, the exercise of the right of eminent domain, the exercise ie power of taxation, which affect property rights, but in which personal ce to persons interested in the subject or object of the proceedings has er been deemed necessary. Some form of substituted service of notice, y publication, has always, from considerations of public policy or ssity, been deemed appropriate to such proceedings, and hence, as to n, 'due process of law.' But we think that, from the earliest period English jurisprudence down to the present, as well as in the jurispru- e of the United States derived from that of England, it has always been idered a cardinal and fundamental principle that, in actions *in personam* eeding according to the course of common law, *personal service* (or its valent, as by leaving a copy at his usual place of abode) of the writ, ess, or summons must be made on all defendants resident and to be found in the jurisdiction of the court. We do not mean that the term 'pro- ing according to the course of the common law,' as used in the books, be understood as meaning, necessarily and always, personal or actual ce of process, for, although service by publication is of modern origin, has always been some mode by which jurisdiction has been obtained mmon law by something amounting to or equivalent to constructive ce, where the defendant could not be found and served personally. what we do mean to assert is that the right to resort to such construc- or substituted service on personal actions proceeding according to the se of the common law rests upon the necessities of the case, and has ys been limited and restricted to cases where personal service could e made because the defendant was a non-resident, or had absconded, d concealed himself for the purpose of avoiding service."

nd in conclusion (p. 104): "We think it would be a surprise to the h and the bar of the country, if it should be held that process or sum-

mons in ordinary civil actions might be served on resident defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. The dangers and abuses that would arise from such a practice are too apparent to require to be named or even suggested. . . . Service by publication in such circumstances is not due process of law, and therefore any statute assuming to authorise it is unconstitutional."

In *State* v. *Guilbert*, 56 Ohio St. 575, the Ohio act of 1896 providing for the registration of title was held to be repugnant to the Constitution, because the publication of a similar notice was not due process of law. The provisions regarding the application, notice, and conclusive effect of registration (pp. 603–609) were similar to the corresponding provisions of the Massachusetts act. In delivering the judgment of the court, *Shauck*, J., says (p. 617):

"The precise objection urged against the act in this regard is that it provides for the divesting of rights in property by the proceeding to register without the issuance and service of summons according to the law of the land. . . . The terms of the act require that the court shall cause the applicant or some other competent person to serve each person named in the application, resident of the county, with a copy of the printed notice. All persons, named in the application, resident without the county though within the state, shall be served by sending copies of such notice to their addresses by mail. Only those who are named in the application are required to be served even in this manner. Reference to s. 7, providing what the application shall contain, and to its form as prescribed in s. 8, shows that the persons to be thus named and served are the owners of the land adjoining that sought to be registered, the occupant of the land to be registered, if it is occupied, and the holders of easements and estates inferior to the fee simple. One known to claim the title in fee simple adversely to the applicant need not be named in the application nor receive a copy of the notice, though his place of residence may be within the county and known. As to him the only requirement is that he may have a chance to see a notice signed by the applicant, addressed '*To whom it may concern*,' containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county" [form, p. 603].

And at p. 620, "That the legislature may provide for a substituted service of judicial process, when it is required by necessity, is not doubted. If, in a suit to adjudicate the rights of persons in property within the

tate, a defendant resides without the state, such necessity is apparent, for he process of the state has no efficacy beyond its borders. Other cases of necessity are recognised.

"The principle is that the state may provide for the adjudication of all adversary rights of persons in property within its borders, and to the end hat such jurisdiction may be complete, the legislature may provide a substituted service of process for cases in which actual service cannot be nade. In such case nothing more is required by the law of the land than hat the substituted service shall be such as in the exercise of legislative liscretion shall be found most apt to accomplish the purpose of actual service. *Shepherd* v. *Ware*, 46 Minn. 174."

And at p. 621, "We know of no instance prior to the passage of this act in which there was a departure from the views clearly stated by Judge Cooley (Const. Lim. 6th ed. 452), 'In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery, public officers may connive with rogues to rob the citizen of his property, witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes, and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law.'

"If it is borne in mind that the questions here considered concern the adversary rights of persons in property, it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain, or the right of taxation."

In *People* v. *Simon*, 176 Ill. 165, the Illinois registration of title act of 1897 was held, one judge dissenting, to be valid, on the ground that according to its construction, the decree of registration was conclusive only upon such persons as were actually served with process or had notice of the proceedings, and that others were barred by the limitation of time contained in it for asserting their claims (ss. 26, 28). But the court, in dealing with the objection that the act authorised a judgment against a resident of the state upon mere constructive service, plainly stated the law to be that substituted service was only permitted in some cases, particularly in that of non-residents, on account of the necessities of the case, and was not admissible in the case of a resident (p. 176). As

regards the particular clause on which the objection was founded, the court said, that it seemed to attempt to make a decree binding upon persons not parties to the suit, and, if given effect to literally, would deprive persons of vested rights without due process of law, and to that extent it could not be upheld; but as it allowed a period of time for persons without notice to assert their claims, it might be construed to make the decree binding only on those properly before the court, while the others would be barred by the limitation after the time had elapsed (p. 177-8). The Ohio case, *State* v. *Guilbert*, 56 Ohio St. 575, above mentioned, having been referred to, the court said (p. 179) that they agreed with the conclusions of that case, viz., that the Ohio statute was unconstitutional, the main ground of that decision being that the statute, in providing for the initial registration, attempted to give jurisdiction to the court without service of summons, and this, it was held, fell short of that due process of law guaranteed by the Constitution.

Nothing contrary to these five cases is to be found in *Parker* v. *Overman*, 18 How. 137, which was a statutory proceeding to confirm a sale for taxes commenced in a state court by a published notice to all persons interested to show cause. The defendants, who were citizens of other states, appeared in the state court, and removed the case to the U. S. Circuit Court. This Court raised the question of jurisdiction, and it was held that, as the case was in the nature of a bill of peace and consistent with the usual proceedings in equity, the federal court had jurisdiction. No question arose whether the published notice was a sufficient process to affect persons not reached by it, and at that time (1855) the 14th amendment had not been adopted. As the defendants had appeared, there was a case pending in the state court between them and the plaintiffs, which was properly removed. The decision on the merits was in favor of the defendants, but there is no reason why the decision, if it had been the other way, should not have bound the defendants, although other persons might not have been affected by it.

If resort is had to the test used in *Murray* v. *Hoboken Land Co.* 18 How. p. 276, to determine whether a process is sufficient that

does not give actual notice, and the settled usages existing at the time when the Constitution was established are regarded, no justification can be found for such a course of proceeding.

The fundamental principle of process is actual notice and an opportunity to be heard. *Loring*, J., showed in an elaborate opinion in the court below that a judgment obtained without personal notice to the adverse party, even where process has been served by leaving it at his residence, has never been held to be conclusive against him, and that some means has always existed for getting rid of it, sometimes provided by statute, sometimes by the courts (*Trans.* p. 41–45).

GROUNDS OF DECISION OF THE COURT BELOW.

A majority of the court below appear to have thought that the Constitution required effectual notice to all claimants who are known or can by reasonable effort be ascertained (*Trans.* p. 37). But it is difficult to discover the grounds upon which they considered that the notices required by the act were sufficient when they did not reach the persons for whom they were intended. The only passage in the opinion that gives any indication of it is the following (p. 37): —

"As to claimants living within the State, and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the post-office, and beside publishing in a newspaper, recording in the registry, and posting on the land. . . . When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice when other means notifying the party, like publishing and posting, also are requisite."

No question had been raised by counsel as to the validity of a notice served by sending it through the post-office, *if the notice was received*. The objection was that the notice, if sent, *might not reach* the adverse party, and that it *might even not be sent*, but in either case the act assumed to make the decree conclusive against him. It is no answer to this objection to say that the mail is a suffi-

cient messenger to convey the notice. Notice is not served by giving it to a messenger to carry, but by his delivering it to the person for whom it is intended. The important point is whether the notice is received or not.

The statement in the passage above quoted regarding the sufficiency of the notice sent by mail seems in its terms to be limited to cases where other means of giving notice, such as publishing and posting on the land, are also employed. But it is obvious that the notice sent, or required to be sent, by mail is not made either better or worse by the use of other means of giving notice. If the notice were not in fact so sent, or, being sent, were not received, that means of giving notice to the person interested would fail, whether some other means of doing so were employed and succeeded or not. The requirement that three different methods of giving notice shall be employed shows the wish of the authors of the act that the notice shall actually reach the persons interested. But if all those methods fail of their purpose, and the decree is still conclusive against them, then they are concluded without having had notice of the proceedings or an opportunity to be heard.

In this passage *the recording* of the application *in the registry of deeds* is referred to as if the majority of the court attached some weight to it as notice to adverse claimants. Another remark in the same opinion at the foot of p. 36 is to the like effect.

But what is recorded in the registry of deeds is no notice to anybody except persons *acquiring title afterwards*, and it does not in any way affect those that are already entitled to any estate or interest.

George v. *Wood*, 9 Allen 80, 83.
Robinson v. *Bird*, 158 Mass. 357, 361.

It is apparent that the only object of the act in requiring this (s. 20), is to give notice to purchasers during the pendency of the proceedings, so that they may take care not to be left out when the decree of registration is made. It is recorded long before it is known that there will be any occasion to give notice to persons adversely interested, which is provided for in ss. 31, 32. Dealings with the land may go on without regard to the proceedings (s. 29), but any

interests so acquired will be lost if they do not appear in the decree of registration (s. 39). Notice of the pendency of the proceedings is therefore to be recorded for the benefit of purchasers. But such notices of *lis pendens* are never notices to the parties to the controversy.

As regards the *probability* of actual notice to adverse claimants by this means, there is not one chance in a thousand that any one would ever have it brought to his attention. People are not in the habit of searching the registry to discover attempts to deal with their land by others after their own title has been acquired.

But although the majority of the court hold that the notice by mail or otherwise is sufficient as to *known claimants within the state*, as well as to others, it is evident that they do not think the act secures actual notice to such persons. For it is said (*Trans.* at the foot of p. 36) that they think the act ought to be amended in that direction, and, if it is not amended, that the judges ought to do all in their power to prevent a failure in that regard; and (at the foot of p. 37) they "agree that *such an act as this is not to be upheld without anxiety*. There would be no occasion for amendment of the act or for such anxiety, if the act secured to adverse claimants the reasonable notice and fair opportunity to be heard that the Constitution requires before their rights are concluded by the decree.

When the case was decided by the court below, the act did not require that the notices by mail to adverse claimants should be registered (s. 32). It has since been amended (1900, c. 354, s. 4), and now requires that such notices shall be sent by registered letter, and that the court shall, so far as it deems it possible, require proof of actual notice (*Appendix, post*, p. 83). As the proceedings complained of in this case are still pending, this amendment seems applicable to them, and the case has been discussed accordingly.

EXAMINATION OF TITLE BY THE OFFICIAL EXAMINER.

It may be urged that the examination of the title by the official examiner is a protection of adverse interests. It would be sufficient to say that this kind of protection cannot dispense with the consti-

tutional requirement of due process in order that the persons adversely interested may protect themselves.

The examiner proceeds independently, without assistance from anybody adversely interested, and reports to the court, not the details of his examination, but only his opinion upon the result. In the present case he merely found the title of record to be good, subject to a specified mortgage and the taxes for the year (*Trans.* p. 13). There is no abstract of title, or indication of any details relating to it, by which the accuracy of his examination may be verified, or by which the correctness of his opinion may be judged. Unless an adverse claimant appears to assert his rights, there is no real trial (s. 35), and nothing comes before the judge, except what is stated in the application and in the opinion of the examiner, and the decree is pronounced upon that alone. The examiner thus becomes the real judge, and the only security for the protection of adverse interests.

The examiner may make mistakes in fact and law. He may overlook a conveyance or an undischarged mortgage, or be misled by a forged deed or forged discharge of a mortgage. A right of way or drainage or other easement may have been gained by user and not appear in the records, and he may not discover it, although the applicant may be aware of its existence. He may easily make a mistake as to the legal effect of documents before him, and even without seeing the point involved. Some former owner, whom he supposes to be entitled in fee simple, may have had only a life estate by reason of the omission of the word "heirs" in an old will. An estate devised to one and his heirs, and cut down to an estate tail by a gift over upon an indefinite failure of issue, may be supposed by him to have passed by the will of the tenant in tail. Or, as in *Ayer* v. *Philadelphia Brick Co.*, 157 Mass. 57, what he assumes to be a good title may have been lost by an estoppel created by a covenant in a deed made before the title was acquired. In almost any case where a question of title has come before the courts, an examiner might have reported favorably upon the title. It is also possible that the examiner may be persuaded or influenced by the applicant to take a view favorable to him, and even fraud is possible. Upon

this last suggestion, the passage from Cooley Const. Lim. quoted by the court in *State* v. *Guilbert* (*supra*, p. 19) may be referred to.

In each of these cases the adverse claimant is unprotected even by the examiner and has no opportunity to protect himself. The judge acts only upon what is laid before him and without knowledge of the facts and without having the question brought to his attention. The judge is in the same position as regards the requirement of s. 32 as amended, that he shall, so far as he deems it possible, require proof of actual notice. How can he know who ought to have actual notice, besides the persons mentioned in this application and the examiner's report? How can his decision upon the evidence, that actual notice has been given to the persons so mentioned, be conclusive upon them, if they have not had notice?

The danger of making the constitutional right of an adverse claimant depend on the negligence or good faith of his opponent and the examiner is clearly pointed out by *Loring*, J. (*Trans.* p. 48).

POWER OF THE STATES TO PRESCRIBE WHAT SHALL BE DUE PROCESS.

This Court has several times declared that it is not in the power of a state to make anything that it chooses due process of law.

Murray v. *Hoboken Land Co.*, 18 How. 272, 276.

Davidson v. *New Orleans*, 96 U.S. 97, 102.

Chicago, Burlington, & Quincy Rld. Co. v. *Chicago*, 166 U.S. 226, 235.

Holden v. *Hardy*, 169 U.S. 366, 390.

But it would be difficult to find anything that a state could not do, if an advertisement in the newspaper, without the names of the persons interested, were considered due process of law in a suit to quiet title against persons that were known and could be personally served within the state. That is the only process provided by this act where the persons adversely interested are not mentioned in the application, and by the terms of the act it is sufficient to support a conclusive decree against them.

SUPPOSED DIFFICULTY OF CLEARING TITLES.

In the opinion of the majority of the court below, a supposed difficulty of clearing titles against all the world, if the process

provided by this act is not sufficient, is suggested as follows (*Trans.* p. 33),

"If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims; indeed, certainty against the unknown may be said to be its chief end, and unknown claims cannot be dealt with by personal service upon the claimant."

The objection to the act is *not* that it provides an insufficient notice in the case of *unknown* claims, but that it attempts to get rid of *known* claims without notice to the claimants in cases where there is no obstacle to giving such notice. There is no difficulty in clearing the title as against such claims. But that would not be sufficient for the purpose of the act. That purpose is that the decree shall be conclusive against *all* claims, *whether known or unknown*, although in the case of known claims no actual notice has been given or the decree has been obtained in fraud or disregard of such claims. If such an effect were given to a decree so obtained in an ordinary suit to quiet the title, everybody would recognise that it was contrary to the first principles of justice. It is none the less so, that the decree is intended to be the basis of subsequent dealings with the title and to enable the person that obtains it to transfer an unquestionable title to a purchaser.

See *Williams* v. *Gibbes*, 17 How. p. 256, where this Court quoted what was said by *Leach*, M.R., as to the injustice of giving to proceedings the effect of conclusively transferring the property of the true owners to one who has no right to it, after a notice given only by advertisement which does not reach the parties really entitled.

It is not necessary to disregard the principles of justice in this way, even for the purpose of registering titles. It may be a convenient and easy way of disposing of the rights of other people, to advertise in a newspaper a notice to whom it may concern, and to enter a decree forever excluding the claims of all that do not appear, without even allowing them compensation (s. 96) in case of mistake or fraud. But it is not necessary to resort to such harsh and sum-

mary methods. If the decree of registration concluded only those to whom proper notice (personal or substituted) is given, it is certain that fewer claims would remain undiscovered. The possible cases, where an adverse right that might have been ascertained has been overlooked, could be provided for by compensation out of the assurance fund *to the purchaser*. The certificate of title would thus be a *guarantee* of the title specified in it. It is doubtful however if any claims would ever be made for compensation on this ground. There are not so many adverse claims that cannot be ascertained, as it is sometimes assumed.

In an examination of the title conducted on behalf of those whose interest it is that no mistake shall be made, it is rare that any possible adverse claim remains undiscovered. The experience of title insurance companies shows this, and the state, with its power of providing new and simple methods of determining the existence of possible claims, is in a much more secure position. But if adverse rights can be got rid of by a general advertisement in a newspaper and a decree by default, there is every encouragement to carelessness, concealment, and fraud.

Titles might also be registered simply as *possessory titles* without any inquiry as to the previous title. Subsequent transactions would be conducted on the register; purchasers would only have to examine the title previous to the registration, and this would become unnecessary after the lapse of time. The English Land Transfer Acts provide for registration, with either an absolute or a possessory title (*Brickdale & Sheldon's Land Transfer Acts*, 9, 134). Any system that does not provide for such registration of titles, without any examination of the previous title, has the serious defect that it can apply only to a limited part of the lands in the state, namely, those of which the title is already beyond question.

No doubt there are also other ways in which registration of title is practicable, for example, the Illinois way. These illustrations are sufficient to show that it is not necessary to disregard the rights of others in order to give effect to it.

As to Non-Residents.

2. The original registration is also obtained without due process of law as against persons *out of the jurisdiction* when they are not mentioned by name or sufficient description in the published notice among those to whom it is addressed.

In such cases any reasonable means of imparting notice to such persons is due process of law (*Arndt* v. *Griggs*, 134 U.S. p. 321).

But a published notice addressed only *to whom it may concern* is not a reasonable means of accomplishing this purpose. Still less is it reasonable when the words "to all whom it may concern" are preceded by the names of other persons not including the names of those whose rights are involved. (See the form in the act, s. 31, also in the Transcript of Record, p. 14.)

As their names are not mentioned in it, their attention would not be attracted if they happened to see it. They might see the descriptions in the notice (*Trans.* p. 15–16) without its occurring to them that they were interested in the lands so described or in the adjoining lands, and the absence of their names in the address of the notice would prevent their reading it. But if their names were mentioned in it, or they were mentioned as the heirs or devisees of A.B., the name would attract their attention, or, if they did not see it, would indicate their interest to their friends or acquaintances who might call it to their attention. It is upon such things as this that published notices depend for their effect.

In *Brown* v. *Levee Commissioners*, 50 Miss. at p. 485, the court says, —

"The course of judicial process, as heretofore established in our laws, was, where the subject was local, but the necessary defendants could not be reached by ordinary process, to give notice by publication to the absent and non-resident, addressed to them *by name*. There is an exceptional case or two dispensing with naming the defendants, in proceedings against the unknown heirs of a decedent, where the plaintiff does not know and cannot ascertain their names. But there is no instance in our legal history where a judicial process has been allowed in personal suits, dispensing with notice, actual or constructive, addressed to the parties by

me, to be charged thereby, where it could be readily ascertained who ey were. As we have seen, the practice has been so uniform and cient, that the defendants must be named, if known, and that they must ve personal notice by due service, or a constructive notice by some eans which the legislature has prescribed, as calculated to come home to e party, that a departure from it in a special case would be obnoxious to e objection that it was not according to due process of law."

As to Persons not in Being.

3. As regards persons *not in being*, the act does not depend on e published notice for the conclusiveness of the decree, for it is mpossible to make any kind of service upon them.

Resort is had to the doctrine of *Clark* v. *Cordis*, 4 Allen 466, 75, where it was held, on the ground of necessity, that the rights f unborn persons might be determined in a suit where proper pro- ision had been made for protecting their interests. This was fol- owed in *Loring* v. *Hildreth*, 170 Mass. 328. By this act (s. 33) he court is authorized to appoint a disinterested person to act as uardian *ad litem* for them.

But if the possibility of unborn persons having an interest does ot appear, or is overlooked, and the court does not exercise its ower of appointing somebody to represent them, then they are ithout protection, as well as without notice.

If the court should attempt to overcome this difficulty by appoint- ng a guardian *ad litem* in all cases to act generally for any persons ot in being that might have an interest, without ascertaining hether there may be any such persons or what their interests may e, the protection would be merely colorable and would not effect its urpose. The guardian could hardly be expected to undertake a resh investigation of title for the purpose of discovering the persons e represented, and it is very likely that he would be representing onflicting interests without knowing it or doing anything for any f them.

These persons form *another class* that may be deprived of their roperty without due process of law.

PROCEEDINGS IN REM.

4. It will be urged that the proceeding for registration is a *suit in rem*, and that the direct notice required by the Constitution in a *suit between parties* is consequently dispensed with.

This contention is based on the course of proceeding in certain suits in admiralty, called *suits in rem*, in which it is not necessary to give direct notice to the persons interested, and yet they are concluded by the decree. It is asserted that the proceedings for registration are of such a nature as to justify the application to them of the phrase *in rem* in some sense. The conclusion is then drawn that it is not necessary to give any notice in such proceedings that would not be required in a suit *in rem* in admiralty.

Suits *in rem* in admiralty and similar proceedings by the government for confiscation of enemy's property or property seized for violation of the revenue or other laws, are the only ones that are strictly and properly called suits *in rem*.

See Dicey Confl. L. 263.

Union Ins. Co. v. *U. S.*, 6 Wall. 759.

Miller v. *U. S.*, 11 Wall. 268, 294, 303.

They are said to be *in rem*, because they are directed *against the thing* as the defendant. Process is served by arrest of the *res* against which the suit is brought, and it is not necessary to give actual notice to persons adversely interested, whether they are within the jurisdiction or not.

The phrase *in rem* however is often applied in a qualified sense to judicial proceedings *against persons* affecting property within the jurisdiction. The object is to indicate that the effect of the proceedings is limited to the property because the persons are not subject to the jurisdiction. Some qualifying expression (such as *quasi* or *in the nature of*) is commonly used in connection with it to show that it is not intended to describe a regular *suit in rem*, or, if the qualification is not expressed, it is understood. When the persons are within the jurisdiction, the effect of the proceedings on the property is exactly the same, but it is not limited to the property and the phrase is not applied to them. In these cases it is necessary to give

otice to the defendants, by *actual service* upon such as are within ie reach of process, and by *substituted service* upon such as are out f the jurisdiction or for some other reason cannot be so served. ubstituted service may be made by publication of a notice designat- g them or by some other reasonable means. But there is *no uthority whatever* for employing only a general notice addressed to whom it may concern" as to defendants within or without the urisdiction.

A definition of a *proceeding in rem* is given by *Marshall*, C.J., n *Mankin* v. *Chandler*, 2 Brock. p. 127; 16 Fed. Cas. p. 626. It aving been urged that proceedings in which a debt had been at- ached were *in rem*, and concluded an assignee, he said,

"What is the nature of a proceeding *in rem?* And in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding *in rem*? If it were, *a rit of right* which demands lands, of *detinue* which demands a personal chattel, would be a proceeding *in rem*, to which all the world would be parties and by which the rights of all the world would be bound. But this, all know, is not the law. What then is the rule by which cases of this description are to be ascertained?

"I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorises the court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties."

In *The Mary*, 9 Cranch p. 144, *Marshall*, C.J., explains the saying that all the world are parties to a suit in admiralty,

"The *whole world*, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason on which this doctrine stands will determine its extent. Every person may make himself a party and appeal from the sentence, but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily

notice to *all those who have any interest in the thing*, and is reasonable, because it is necessary, and because it is the part of the common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person therefore *who could assert any title* to the Mary has constructive notice of her seizure and may fairly be considered as a party to the libel. But *those who have no interest* in the vessel which could be asserted in the court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties to the cause so far as respects the vessel."

This is stated more shortly by *Gray*, J., in *Scott* v. *McNeal*, 154 U.S. p. 46,

"Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court."*

Field, J., says, in the *The Moses Taylor*, 4 Wall. p. 427,

"The distinguishing and characteristic feature of such suit [a suit in admiralty] is that the vessel or thing proceeded against *is itself seized* and *impleaded as the defendant*, and is judged and sentenced accordingly."

In *Hine* v. *Trevor*, 4 Wall. p. 571, *Miller*, J., speaking of the case before the Court, said,

"It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that *the vessel* may be sued and made *defendant* without any proceeding against the owners, or even mentioning their names. That a writ may be issued and *the vessel seized*, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued."

In *Freeman* v. *Alderson*, 119 U.S. p. 187-8, *Field*, J., explains the distinction between regular suits *in rem* and proceedings to which the expression *in rem* is applied in a qualified sense, as follows,

"*Actions in rem*, strictly so considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or

* These statements regarding the parties to a suit *in rem* agree exactly with the account of the origin of suits *in rem* contained in the judgment of *Jeune*, J., in *The Dictator*, [1892] P. D. pp. 311-313; *post*, p. 38.

plaintiffs. The property itself is in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases *by its seizure*, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.

"There is however a large class of cases which are *not strictly actions in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought *against persons*, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which the property of *non-residents* is attached and held for the discharge of debts due by them to citizens of the state,* and actions for the enforcement of mortgages and other liens. Indeed all proceedings having for their sole object the sale or disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that *citation to him is required*, and that judgment therein is only conclusive between the parties."

In *Meyer* v. *Kuhn*, 65 Fed. R. p. 712, where, in a suit for partition, a mistake had been made in the name of a non-resident defendant to whom notice was given by publication, the present Chief Justice said,

"Proceedings in partition or to quiet title *are not strictly proceedings in rem*, for they are not taken directly against property, but they are regarded, as far as they affect property, as *proceedings in rem sub modo*, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted. *Arndt* v. *Griggs*, 134 U.S. 316. When however constructive service by publication is substituted by statute in place of personal citation, a strict compliance with statutory provisions is exacted."

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*In the offices of the clerks of the courts i Massachusetts, the jurisdiction in these cases has long been designated as *ex re*, which seems to indicate its derivation as well as the phrase *in rem*, and without the danger of confusion arising from the use of a phrase that has already acquired a distinct technical meaning.

See also,

Pennoyer v. *Neff*, 95 U.S. pp. 727, 734.
Burke v. *Trevitt*, 1 Mason p. 100.
The Hibernia, 1 Sprague p. 82.

In proceedings by the government *in rem* for the condemnation of *land* as enemy's property, the same rules, as regards seizure and notice, are observed. In *Windsor* v. *McVeigh*, 93 U.S. 274, where land had been seized and the claimant was refused permission to appear on the ground that he was an enemy, the decree was held in a subsequent action of ejectment to be invalid. *Field*, J., said (p. 279),

"The *seizure* in a suit *in rem* only brings the property seized within the custody of the court and *informs the owner* of that fact. The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its *seizure* will therefore operate to *impart notice* to him. Where notice is thus given the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognised and its exercise allowed before the court can proceed beyond the seizure to judgment."

In *Hollingsworth* v. *Barbour*, 4 Pet. 466, this Court concurred in and adopted (p. 470) the following language of *Trimble*, J., in the court below (p. 475),

"The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule [regarding the service of notice]. They are not properly exceptions. The law regards the *seizure of the thing* as constructive notice to the whole world; and all persons concerned in interest are considered as affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first *seized* and taken into the custody of the court. The case under consideration is not properly a proceeding *in rem*; and a decree in chancery for the conveyance of land has never yet within my knowledge been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on the party. *There is no seizure* nor taking into the custody of the court the land, so as to operate as constructive notice."

In order to avoid the necessity of giving the direct notice to persons interested that is required in a suit *against persons*, it must be shown that the proceedings for registration are strictly proceedings *in rem*, as suits in admiralty are, and then the seizure, which is the notice required in such proceedings, must be made. It is not enough to show that they are *quasi in rem* or *in the nature of* proceedings *in rem* as regards persons out of the reach of regular service, for that would only justify a substituted service on such persons. One of the things in which such proceedings differ from proceedings strictly *in rem*, is that citation even of non-resident defendants is necessary (*Freeman* v. *Alderson*, 119 U.S. p. 188).*

It is plain that the proceedings for registration are not strictly proceedings *in rem*. The land is not *seized*, and it is not proceeded against as the *defendant*. These distinguishing features of a regular suit *in rem* are entirely absent. As the land is not seized, the *notice* required in such proceedings, and implied from a seizure, is not given.

It cannot even be shown that the proceedings are *quasi in rem* as to persons upon whom actual service can be made, for the jurisdiction is never said to be *quasi in rem*, except when the jurisdiction of the *person* fails and the jurisdiction is limited to the *res*.

In *Cooper* v. *Reynolds*, 10 Wall. p. 318, where the property of a non-resident defendant had been attached, *Miller*, J., says,

"If the defendant appears, the cause becomes mainly a suit *in personam* with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

In *Freeman* v. *Alderson*, 119 U.S. p. 190, where a prior action had been brought to try the title to an undivided interest in land

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*If a suit to quiet title or to recover specific property were sufficiently *in rem* to justify a judgment without actual notice, the same procedure might be applied to actions for debt or damages where an attachment of property is made, for the latter are as much *in rem* or *quasi in rem* as the former.

and to have partition, and a non-resident defendant had been cit by publication, *Field*, J., said,

"Such action, though dealing entirely with the realty, is not an acti *in rem* in the strict sense of the term; it is an action *against the part* named, and, though the recovery and partition of real estate are soug that does not change its character as *a personal action;* the judgm therein *binds only the parties* in their relation to the property."

The only supposed resemblance to an action *in rem* is the citati of all the world by advertisement in a newspaper. But this adv tisement has been employed only in modern actions *in rem* as additional precaution. It is not necessary for the validity of t proceedings, because the *seizure* is itself notice, and if the proce ings for *registration* were *really in rem*, both the notices advertis and those sent by mail would be unnecessary, so far as the requi ments of due process are concerned.

The publication of a citation in a newspaper was not original part of the process in a suit *in rem* in admiralty. The warra required the marshal to arrest the ship or cargo and to cite persons having or claiming an interest (Coote Adm. 194), and was served merely by "producing the original before the master a crew, and affixing a copy to the mast of the ship" (2 Browne Ci & Adm. L. 398; Coote Adm. 13; see also 2 Wheat. appx. 20 If there was no appearance in defence, the suit proceeded by defaul to a decree in the manner stated in 2 Browne Civ. & Adm. L. 399, a Coote Adm. 102. There was no publication in a newpaper in a of these proceedings, even if such publication was then practicabl Advertisement in a newspaper was required by a U.S. statute certain revenue cases (1799, c. 22, s. 89 (1 Sts. 696)), and th requirement was afterwards extended by rules of court to suits admiralty (see Dist. Court (N.Y.) rule 46 in Betts Pr. (183 appx. p. 14, which refers to that statute, and the present U. Adm. rule 9, adopted in 1844, 3 How. v). It is to be inferred fro the language of *Marshall*, C. J., in *Mankin* v. *Chandler*, 2 Broc 127; 16 Fed. Cas. 626 (*supra*, p. 31) that at that time (182 such advertisement was not generally used in admiralty. In En land it is only used for notices of sale upon default, and it w

first required in such cases by the new rules of 1859 (2 Pritchard's Dig. 534, 536; Wms. & Bruce Adm. 204, appx. p. xxix, rule 19).

In the proceedings for registration, the *defendants* are the persons claiming adverse interests in the land, and the purpose of the proceedings is to exclude them from the interests they claim. The act requires that they be named, if known (s. 31, form), and, whether they are named or not, they are made defendants by the description, "whom it may concern" (s. 35). The proceedings are directed against them just as any suit to quiet the title would be, and the decree quiets and confirms the title of the applicant conclusively against them (s. 38). These are no more strict proceedings *in rem* than any other suit to quiet title is.

DECLARATIONS IN THE ACT AS TO NATURE OF THE PROCEEDINGS.

The act shows on its face that the difficulty of making the decree conclusive against persons that have no notice was to some extent foreseen. The attempt was made to overcome the difficulty by giving to the proceedings the effect of a suit *in rem* in admiralty. It was assumed that the legislature might by changing the form of proceeding dispense with the notice that the Constitution would require if the proceeding were *against persons*.

It is provided (s. 38) that the decree "shall *bind the land* and quiet the title thereto." This would have been sufficient to justify substituted service on persons out of the jurisdiction, but the proceedings do not thereby become strict proceedings *in rem*. The judgment or decree always binds the *property* in proceedings *quasi in rem*. It was not necessary even to go so far in order to give this effect to the decree. The subsequent provision (s. 38) that the decree "shall be *conclusive* upon and against all persons," would have been quite sufficient by itself to make the decree operate on the land (*Short* v. *Caldwell*, 155 Mass. 57). It is only when the decree requires the adverse claimant to do some act, such as bringing an action to try the title, that its effect is confined *to the person* (*Macomber* v. *Jaffray*, 4 Gray 82).

Also (s. 35) "by the description in the notice 'to all whom it may concern' *all the world* are made *parties defendant* and shall be con-

cluded." This phrase is taken from cases in admiralty, where it means, as it does here, all persons that have an interest, and, by the express terms of the act, only persons claiming an interest are allowed to appear (s. 34). There are only two ways of making all such persons defendants. One is by proceeding directly against them personally. The other is by proceeding against the property, which is in effect proceeding against all persons interested in it.* According to the historical account by *Jeune*, J., in *The Dictator*, [1892] P. D. pp. 311–313, the action *in rem* originated in the arrest of the *res* to compel the appearance of the defendant, and later, as the idea of a maritime lien developed, the arrest became the distinctive feature, having for its primary object the satisfaction of the creditor out of the property. The proceeding prescribed by the act is not *against the property* and therefore is not strictly *in rem*.

In s. 2, as amended 1899, c. 131, s. 1, it is provided, "The proceedings upon such applications *shall be* proceedings *in rem*, and the decrees shall *operate directly on* the land and *vest and establish title* thereto." The first part of this amendment was an attempt to change the *character* of the proceedings without making any change in the proceedings themselves. It has as much effect, and no more, than if it were provided that the proceedings in an action of ejectment or upon a writ of entry, or in a suit to quiet title, should continue to be the same as before, but that those proceedings should be proceedings *in rem*. That would not change their nature, though it might be necessary afterwards to call them by their statutory name. The rest of the amendment adds nothing to the provision (s. 38) already mentioned, that the decree shall *bind the land* and *quiet the title*.

The Ohio act contained a similar provision (s. 81), that the decree "shall be in the nature of a decree *in rem* and shall be final and conclusive as against the right of every and all persons, known and unknown," &c. (92 Ohio Laws, p. 239).

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* See the quotations, *ante*, p. 31–32, from *The Mary*, 9 Cranch. p. 144, and *Scott* v. *McNeal*, 154 U.S. p. 46.

DECISIONS AS TO NATURE OF THE PROCEEDINGS.

In *Brown* v. *Levee Commissioners*, 50 Miss. p. 486 (*supra*, p. 14), where it was proposed by similar proceedings to conclude all persons claiming an interest in lands that had been sold for taxes, the court said,

"The statute was framed on the idea that, because the act of 1865 impressed upon the land a lien for the taxes, it was competent to give a remedy in the nature of a suit *in rem*. The lien was given to make the demands of the levee board paramount to all encumbrances which the taxpayers could impose or suffer on their property. But if the suits were merely dependent for their support on the liens, it did not thereby become a 'proceeding *in rem*' any more than would *detinue*, *replevin*, or *foreclosure suits* of mortgages or other liens."

In *Bardwell* v. *Collins*, 44 Minn. 97 (*supra*, p. 15), where a statute had assumed to authorise a judgment in an action to foreclose a mortgage or to enforce a lien on real estate, without service of process except by publication, the court considered the nature of the action, as follows (p. 101),

"It is not an action *in rem*, but an action *in personam*. It is true it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage, and in that sense it partakes somewhat of the nature of a proceeding *in rem*, but not differently or in any other sense than do actions in ejectment, replevin, for specific performance of a contract to convey, *to determine adverse claims to real estate*, and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the *property*, but against the *persons*, and the judgment binds only those who are parties to the suit and those in privity with them."

In *State* v. *Guilbert*, 56 Ohio St. 575 (*supra*, p. 18), the proceedings for registration were in substance the same as those prescribed in the Massachusetts act, and it was necessary for the court to consider whether they might be supported as proceedings *in rem*. The judgment on this point was as follows (p. 618):

"Whether it is *in rem* or *in personam* is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings *in rem*, and thus invest the proceedings with

that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit *quia timet* to settle title. It bears the least possible analogy to a proceeding *in rem*. The *res* is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and it partakes therefore less of the nature of a proceeding *in rem* than does the foreclosure of a mortgage. The land is not a thing of shifting situs like a ship, against which obligations may accrue to-day in one jurisdiction and to-morrow in another. The status of the land is not changed by registration. The substantial thing determined by registration is that the person who makes the application has a right of property in the land to the exclusion of all other persons. The judicial force of the proceeding is wholly expended in a conclusive determination of the rights of persons in the land. Except when the land is occupied by one who claims adversely to the application, the questions determined in the registration are such as both before and since the adoption of the Constitution have been determined by courts of equity, and their decrees much more distinctly than the judgments of courts of law operate upon persons."

GROUNDS OF THE OPINION OF HOLMES, C.J.

Holmes, C.J., speaking for himself, but not for the majority of the court below, maintains the validity of the notice provided by the act on the ground that the proceedings are *in rem*, and this is the subject chiefly discussed in his opinion. At p. 35 of the Transcript, he says:

"But it is said that this is not a proceeding *in rem*. It is certain that no phrase has been more misused. In the past it has had little more significance than that the right alleged to have been violated was a right *in rem*. Austin thinks it necessary to quote Leibnitz for the sufficiently obvious remark that every right to restitution is a right *in personam*. So as to actions. If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally in theory at least binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to or possession of a tangible thing. *Mankin* v. *Chandler*, 2 Brock. 125, 127. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any

sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. 2 Freeman, Judgments, 4th ed. s. 606, *ad fin.* All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected."

This statement of the difference between an action *in rem* and an action *in personam* is not supported by any authority, and it does not agree with what has been laid down by judges of this Court in the cases above mentioned. It leaves out of account entirely what they have called the distinguishing feature of an action *in rem*. If it is sound, it may be sufficient to justify the absence of the notice that would be required in actions *in personam*, but it is not sufficient to dispense also with the notice required in actions *in rem*. This notice is given by *seizure of the thing*, but in these proceedings there is no seizure. It is said in the opinion that "except as security against escape, seizure is a mere form, of no especial sanctity, and of much possible inconvenience" (*Trans.* p. 36), but what is supposed to take its place as *notice* is nowhere stated.

According to the test so asserted, the case of *Brown* v. *Levee Commissioners*, 50 Miss. 468 (*ante*, pp. 14, 39) was wrongly decided, for the suit, being instituted against all persons having or claiming any interest, was *in rem*, and that case, instead of being commended by this Court in *Hurtado* v. *California*, 110 U.S. p. 536, as "a well-considered case," ought to have been condemned as a misapplication of constitutional principles. On the other hand, tried by the same test, *Bardwell* v. *Collins*, 44 Minn. 97 (*ante*, pp. 15, 39) which followed the rules laid down in that case, was nevertheless rightly decided, because it was directed against a defendant, Collins, by name, and was therefore *in personam*. But if Collins's name had not been mentioned, and judgment had been claimed against all persons interested, the proceeding would have been *in rem*; and, although he was in reality the only person interested and the only one to be affected by the judgment, it would not have been necessary to give him any notice otherwise than by the notice that was published in the newspaper. In this manner every kind of action, in which property is claimed, might be transformed into a strict suit *in rem*,

simply by omitting the names of the defendants and claiming the property against whom it may concern.

But this attempted distinction between an action *in rem* and an action *in personam* cannot be supported. There is no form of action that really goes against persons generally. Even as regards suits in admiralty, in which it is said that "all the world" are defendants, a qualification is understood by which "all the world" is limited to such of the world as have or claim to have an interest. This appears from what is said in *The Mary*, 9 Cranch p. 144, and *Scott* v. *McNeal*, 154 U.S. p. 46 (*supra*, pp. 31–32).

The defendants are just as determinate as if they were mentioned by name. The number is not increased by giving them an indefinite description, instead of specifying their names. No other persons can make themselves parties or are bound by the judgment.

Austin shows that *all rights of action* are rights against *determinate* persons. He explains that the phrase *in personam*, in the sense in which it is used in Roman law and jurisprudence, refers, not to persons generally, but to *determinate* persons, while the phrase *in rem* signifies *generality*, and does not mean "against the thing," as it does in English law when it is applied to suits in admiralty. Accordingly a right of action cannot be a right *in rem* in that sense; for, he says, it is evident that such a right can exist only against the particular persons from whose acts the right has arisen. But certain actions for *restitution*, as distinguished from actions for *satisfaction* in damages, were called *actions in rem*, and the important point that he impresses upon his hearers, lest they may be misled by this use of the phrase, is that such actions, as well as all others, are actions against particular or *determinate* persons. In his Lectures (4th ed. 1879) at p. 388, he says,

> "All rights founded upon injuries, or *rights of action* in the largest sense of the word, are rights *in personam*, equally with those which arise from contracts: and, like all rights *in personam*, are rights to acts or forbearances on the part of *determinate* persons, and to nothing more."

A few pages further back (p. 380), he explains the meaning of the phrases *in rem* and *in personam*: —

"At present, I will merely point at an ambiguity which perplexes and obscures the import of *jus in rem*.

"The phrase *in rem* denotes the *compass* and not the *subject* of the right. It denotes that the right in question avails against *persons generally*, and *not* that the right in question is a right over a *thing*. For, as I shall show hereafter, many of the rights, which are *jura* or rights *in rem*, are either rights over, or to, *persons*, or have *no* subject (person or thing).*

"The phrase *in personam* is an elliptical or abridged expression for 'in personam *certam* sive *determinatam*.' Like the phrase *in rem*, it denotes the *compass* of the right. It denotes that the right avails *exclusively* against a *determinate* person, or against *determinate* persons."

After the passage first above quoted, he proceeds, p. 388,

"Some confusion has arisen upon this point from the *actio in rem* of the Roman lawyers. . . .

"All rights of action must, it is evident, be founded on rights *in personam*, that is, on rights which avail exclusively against the determinate person or persons against whom the action will lie, although those persons may have been brought under that designation by committing an offence against a right *in rem*. *Actions in rem* are rights of action founded on an offence against a right *in rem* and seeking the *restitution* of the party to the enjoyment of that very right, and *not merely satisfaction* for being deprived of it. Thus an action of *ejectment* in English law would be said by the Roman lawyers to be an action *in rem*, because it is founded upon an act of dispossession infringing upon my right of ownership in the land, and because it seeks the restoration to me of that specific right. So likewise an action of *detinue* would be called an action *in rem:* but an action of *trover* would not; because, though founded upon the supposition of a wrongful conversion of the subject claimed to the defendant's use, it does not seek specific restitution, but merely satisfaction or damages." †

The same subject is mentioned again in a note at p. 968,

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* *E. g.* rights to personal safety and freedom, reputation, immunity from damage by fraud. Holland, Jurisprudence (1st ed. 1880) 109.

† So a *suit in equity* for recovery of specific chattels, or for an injunction against the erection or maintenance of a building obstructing a right of way or light and air, would be called an *action in rem* in the Roman law, although equity is said especially to operate *in personam* upon the parties (*Massie* v. *Watts*, 6 Cranch 148; *Cole* v. *Cunningham*, 133 U.S. 107, 117-119). But a *suit in admiralty* against a ship for damages caused by a collision would *not* be called an action *in rem*, because it only seeks satisfaction in damages.

"(d) *Rights of Action*, with all other rights founded upon *injuries*, are also *jura in personam*. For they answer to obligations attaching upon the *determinate* persons, from whom the injuries have proceeded, or from whom they are to be apprehended.

"It is true that difficulties have arisen about the nature of Actions *in rem*; i. e. those Actions (or, rather those Rights of Action) of which the *ground* is an offence against a right *in rem*, and of which the *intention* (scope, or purpose) is the *restitution* of the injured party to the exercise of the violated right. But these and other difficulties besetting the Theory of Actions, appear to have sprung from this: that the nature of the right which is affected by the injury, and the nature of the remedy which is the purpose of the action, are frequently blended and compounded by expositors of the Roman law. . . .

"To pursue this subject further were inconsistent with my present purpose. But before I dismiss it, I will advert to an important remark made (I think) by Leibnitz — Every right to *restitution* is a right *in personam*. . . ."

These quotations from Austin show that jurisprudence furnishes no ground for contending that the question whether the proceeding is an action *in rem*, depends on the number of persons affected by it. It is clear that there is no connection between an action *in rem* in the English sense and an action *in rem* in the Roman sense. The Latin words *in rem*, applied to an action in the English sense, are used to express a purely English notion, as other Latin words are often used in English law. They mean literally that the action is in form directed *against the thing* as the defendant. When they are used to describe the judgment in such an action, they have the same literal meaning, namely, that the judgment is *against the thing*. The persons that are affected by the judgment are those that claim an interest in *the thing*, and no others, whether the number is large or small. According to the historical account given by *Jeune*, J., in *The Dictator*, 1892, P.D. pp. 311–313 (*supra*, p. 38), this kind of action appears to have had an English origin.

JUDGMENTS IN REM IN PROCEEDINGS THAT ARE NOT IN REM.

Certain judgments in other proceedings, not proceedings *in rem*, are also called, in English and American law, *judgments in rem*. The chief instances of such judgments are the judgments of ecclesiastical

or other courts having jurisdiction in matrimonial causes. The proceedings in these cases are *inter partes*, but the judgments are conclusive adjudications of the status of the parties and bind all the world (2 Sm. L.C. (6th ed.) 699, 714; (8th ed.) 810, 828).* The manner in which the interests of other persons, not parties, may be affected by such judgments, is shown by *Bunting's Case*, 4 Rep. 29, and *Kenn's Case*, 7 Rep. 42. Decrees appointing guardians for persons found to be of unsound mind are another instance (*Leonard* v. *Leonard*, 14 Pick. p. 283). Actual notice of the proceedings is given to a respondent within the jurisdiction, and it is not likely anybody would suggest that an advertisement in a newspaper could be properly substituted for actual notice in such a case. Although the phrase *in rem* is applied to such *judgments*, it is never applied to the *proceedings* in which they are obtained. It is evident that the phrase cannot have the same literal meaning with reference to these judgments, as when a judgment in admiralty against a ship is called a judgment *in rem*.

Austin says that this manner of applying the phrase *in rem* is manifestly borrowed from the Roman lawyers, for it is analogous to the manner in which they employ it in their writings; and he explains that, when they use the phrase, they always intend a something which avails generally or universally: in favor of a *determinate* person against persons *indeterminate;* or in favor of *indeterminate* persons

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*It is sometimes said that the object of the proceedings for registration is to ascertain the *status* or condition of the land as to title, as if that would authorise a conclusive decree without actual notice. But this is only another form of saying that the object is *to try the title*, and in actions for that purpose actual notice is required. The only way in which registration can change or affect the *status* of the land, is by adjudging that *the title* is in the applicant and excluding the claims of the defendants, as is done in any suit to quiet title. It may be doubted whether the term *status* can be properly applied to *title*. It is generally applied only to persons. Austin says that the only meaning he can possibly attach to it, is "a set of rights and duties, specially regarding *persons* of a given class, which for the sake of convenient arrangement, it is expedient to detach from the body of the legal system" (Jurisprudence, 4th ed., 742). It will be difficult to find an instance in which proceedings to determine a *status* can be maintained without other notice to the persons interested than an advertisement, where it is practicable to give other notice.

against a person *determinate*. How the phrase *in rem* came to acquire this meaning, he says, it is difficult to perceive; it is an elliptical expression, and it might be possible to restore the links, to connect *res* (as signifying a *thing*) with *in rem* (as signifying *generality*) but he does not undertake to do it. (Jurisprudence (4th ed. 1879) p. 990–991.)

The Roman lawyers however do not appear to have applied the phrase *in rem* to *judgments*. Savigny speaks of judgments that conclude persons not parties to the action or their privies, as judgments that establish *jus inter omnes*, and says they are exceptions to the general rule that a judgment establishes *jus inter partes*. The same extension of the effect of the judgment, he says, is expressed by *judex jus facit*, referring to the Digest for instances. The few cases, to which the exception applies, appear to relate chiefly to personal status, the right of succession, and the validity of testaments, and to a certain extent to sureties (Savigny, Droit Romain (Paris, 1849), vol. 6, pp. 478–484). But the expression *judgment in rem* is not used.

TWO DIFFERENT KINDS OF JUDGMENT IN REM.

The result seems to be that the English lawyers use the phrase *in rem* in regard to *judgments* in two distinct senses, having no relation to one another. One is the literal sense of the English words, *against the thing;* in this sense it is applied to a judgment in an action *in rem* in admiralty, which binds *the thing* itself and thereby the rights of the persons interested in it, and they are deemed to be constructively *parties* to the action. The other is the Roman sense of *generality*, in which it is applied to judgments in certain proceedings *inter partes*, where not only the parties, but all other persons, are bound by the judgment. No definition of *judgment in rem* can be stated that will include these two different meanings. It is not admissible to argue from the fact that judgment is recovered in one of these cases by a proceeding *in rem*, that the *proceeding* is therefore *in rem* in every case where a judgment *in rem* is recovered. Still less is it admissible to argue that the proceeding is *in rem* whenever the legislature declares that the judgment shall be conclusive on all persons interested whether they have notice or not.

PROBATE AND ADMINISTRATION.

Grants of *Probate* and of *Administration* are not strictly judgments *in rem*, but they are said to be *in the nature of* judgments *in rem*, for they actually invest the executor or administrator with that character and are conclusive against all the world (2 Sm. L.C. (6th ed.) 713; (8th ed.) 827). But the term *in rem* is not applied to the *proceedings* in which probate or administration is obtained.

The probate or administration does not depend for its effect on any *notice* that may have been given of the application. It has the same effect although it is granted without any previous notice of any kind (*Waters* v. *Stickney*, 12 Allen p. 4) or, according to a common form practice, upon mere production of a will purporting to be regularly executed and an affidavit of the executor, without further evidence (1 Wms. Ex. (8th ed.) 332, 334). It is also to be observed that the absence of a probate is just as conclusive against a will in any court, except the probate court, as a probate would be in its favor (1 Wms. Ex. 297).

The conclusive effect of such proceedings is however limited to such other courts, and appears to be due to the exclusive jurisdiction of the probate courts, which will revoke the grant in a proper case, even where a will has been proved in solemn form (*Waters* v. *Stickney*, 12 Allen 1, 4). In proceedings in England for probate in solemn form, the citation is addressed to the defendants by name, and is served upon them personally, when practicable (Coote, Prob. Pr. (6th ed.) 262, 466 form), and the proceedings are *inter partes* (see *Kennaway* v. *Kennaway*, 1 P.D. 148; Coote, Pr. 251, 255). Such probate is generally irrevocable as against all persons so cited or cognisant of the proceedings (Coote, Pr. 251). In our proceedings for probate in Massachusetts, the defendants are described as the heirs at law, next of kin, and other persons interested, but the proceedings are none the less against them personally, and, if there is a contest, are entitled and conducted as other suits *inter partes*.

But, although the probate of a will is not final and irrevocable, there is no reason why it might not be made so by statute without violating the Constitution. When a man dies, his property passes

from him and goes to such persons or in such manner as the st
has designated (*U.S.* v. *Perkins*, 163 U.S. p. 628). The st
has the same power to determine the manner in which the n
owners shall be ascertained as to designate who they shall be.
statute providing that the probate of a will, proved after a gener
notice published in a newspaper or posted in a public place, shou
be irrevocable, would not deprive the heirs or next of kin of th
property, for the property of the deceased owner would never ha
become theirs. It would have passed from him to the perso
designated by the statute to succeed to his property. A statu
might provide that in case of intestacy the heirs or next of k
should be ascertained by similar proceedings. Some of the heirs
next of kin might, from want of notice, lose the opportunity of di
puting the will or of asserting their claims as heirs or next of ki
but they would not be deprived of their property. The state is n
bound to give the property to a class of unascertained persons wit
out any means of determining whether there are any such perso
or who answer the description. It may properly provide that th
property shall go to such persons as shall be ascertained in a sum
mary manner prescribed by statute to be the persons answering
certain description, and only the persons so ascertained will acquir
any interest in the property.

ESCHEATS.

This principle has been applied in the case of proceedings t
determine whether the state is entitled by *Escheat*. Such a pro
ceeding is often said to be *in rem* in a qualified sense, or, as
expressed in the language quoted in *Hamilton* v. *Brown*, 161
U.S. p. 269, "The proceeding, while not strictly a proceeding *in*
rem, has many of its characteristics." At common law it was had
by inquest of office, and a finding in favor of the king was not abso
lutely conclusive, for the facts found in his favor might afterward
be traversed as mentioned in *Hamilton* v. *Brown*, 161 U.S. p. 263.
But a statute providing for a *final determination*, after notice to all
known claimants and a general notice by advertisement, is valid, on
the same principle as provisions for ascertaining the next of kin
entitled to share in the distribution. In the judgment of this Court

in *Hamilton* v. *Brown*, where the subject was elaborately considered, the grounds were stated as follows (161 U.S. p. 268): —

"But the whole object in proceedings for escheat, as in proceedings of administration, is to ascertain who are entitled to the estate of a deceased person; in proceedings of administration, to distribute the assets, after payment of debts, among those who come forward and prove themselves to be next of kin; in proceedings for escheat, to ascertain and determine, once for all, so far as concerns the title in the land itself, whether the former owner left no heirs or devisees, that being the single question on which depends the issue whether or not the land has escheated to the state."

And in conclusion, at p. 275, "When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law; and a statute providing for such proceedings and determination does not impair the obligation of any contract contained in the grant under which the former owner held, whether that grant was from the state or from a private person."

No such principle is applicable to cases like the present, where the object of the proceeding is to adjudicate upon rights that have already vested under laws existing at the time. If persons having such rights are concluded by a decree in favor of the applicant, they are deprived of their property.

WRITS OF RIGHT AND FINES.

The proceedings anciently had upon *Writs of Right* and *Fines* are spoken of by *Holmes*, C.J., "*as standing half way* between statutes of limitations and true judgments *in rem*" (*Trans.* p. 33); the effect of a judgment upon a writ of right and the lapse of a year and a day being to bar the rights of strangers who did not make claim within that time, unless they were under disability or beyond sea;

and a fine having a similar effect, afterwards modified by the statu
mentioned in 2 Bl. Com. 354.

A *writ of right* is taken by *Marshall*, C.J., as an example of
kind of proceedings that are plainly not *in rem* (*Mankin* v. *Chandl*
2 Brock. p. 127; 16 Fed. Cas. p. 626; *supra*, p. 31).

In the court below, *Loring*, J., points out that the rights
strangers were barred in writs of right and fines, not by the jud
ment, but by the lapse of the year and a day, and that the princi
was the same as that of statutes of limitations (*Trans.* p. 46).

It also appears from the marginal note in Booth on Real Actio
p. 101, cited by *Holmes*, C.J., as to writs of right, that the ye
and day ran, not from the judgment, but from *execution*. And
Stowel's Case, Plowd. 357 b, it is said, quoting *Herle*, that

"in these cases of a recovery in a writ of right, and also upon a fine exec
tory levied, the recovery and the fine ought to be executed by entry
execution by suit, for transmutation of *the possession* is a part of noti
to strangers, and gives them an opportunity of bringing their action, or
making their entry within the year and day afterwards, and unless the r
covery or fine be executed, *none shall be barred* by non-claim."

In Pollock & Maitland's History of English Law (1895, vol. 2
p. 75), it is said, regarding writs of right,

"Next we must observe that the judgment in this action will *not* pre
clude a third person from claiming the land. The judgment, if it b
followed by inaction on his part for some brief period — ultimately yea
and day was the time allowed him — may preclude him, should he be i
this country and under no disability; but *the judgment itself is no bar.*

And in a note is added, "The exception against him will be, not *excepti
rei judicatæ*, but *exceptio ex taciturnitate*."

Further on, at p. 101, it is said, "but just as when there had been judg
ment on a writ of right, the fateful year and day did not start until seisi
had been delivered by the sheriff to the victorious demandant, so when
fine was levied, it was often necessary that a writ of seisin should b
sued out and that seisin should be delivered. Seisin under the order o
the king's court, seisin under the king's ban, — it is this rather than th
mere compromise of an action that, if we look far enough back, seems th
cause of preclusion."

The injustice of barring the claims of remaindermen and reversioners by non-claim before their rights accrued led to the passage of the 34 Ed. 3, c. 16 (*Stowel's Case*, Plowd. 359, 360), by which the effect of non-claim in the case of fines was abolished; and when it was revived by the 4 Hen. 7, c. 24, the time allowed for making claims was enlarged to five years after proclamations, and a further time was allowed to persons under disability or beyond seas and those whose rights accrued afterwards (3 Rep .(ed. 1826) p. 231, note).

Fines were never in use in Massachusetts (*Fowler* v. *Shearer*, 7 Mass. p. 20, by *Parsons*, C.J.).

These proceedings did not in any way approach judgments *in rem*, for they were entirely proceedings between the parties, and strangers were not bound by the judgment. If they had been, they could not have entered on the land, or asserted any claim contrary to the judgment. In the writ of right, the only question determined was whether the demandant or the tenant had a better title than the other (3 Bl. Com. 195–196; 2 Pol. & Mait. Eng. Law, 75). The fine was only the result of the agreement between the parties (2 Bl. Com. 349–351). Other persons were as free to assert their rights as they were before, provided that they did so within the time allowed by law for that purpose.

The validity of statutes limiting the time within which rights may be enforced has always been maintained by this Court, where the time allowed is reasonable in the circumstances. Their validity is maintained on the ground, not that the right is taken away by due process of law, but that the party had neither an unrestricted right to sue, nor a vested right in a particular limitation (*Terry* v. *Anderson*, 95 U.S. p. 633), and that no vested right is impaired (*Christmas* v. *Russell*, 5 Wall. p. 300; *Vance* v. *Vance*, 108 U.S. p. 517–18). The restricted right given by law is lost if it is not exercised within the time limited for the purpose.

Wheeler v. *Jackson*, 137 U.S. pp. 255, 257–8.

Turner v. *New York*, 168 U.S. 90, 94.

Saranac Land Co. v. *Comptroller of New York*, 177 U.S. 318.

WHAT NOTICE IS RELIED ON IF PROCEEDINGS ARE IN REM.

But if the proceedings for registration are treated as a suit *in rem*, it is not clear what is relied on as sufficient notice to persons adversely interested.

The notice inferred from *seizure* of the *res* in regular suits *in rem*, is not given, for there is no seizure.

It seems to be conceded that *advertisement* is not the effective part of process *in rem* (*Trans.* p. 34), and notice has never been inferred from it where it did not actually reach the persons interested. Advertisement might therefore have been dispensed with, as well as personal service, if the notice required in regular suits *in rem* was given.

What then remains, when seizure, personal service, and advertisement are dispensed with? It is said (*Trans.* p. 37), "Notice is to be *posted on the land* just as admiralty process is *fixed to the mast.*" But it is hardly conceivable that a copy of a warrant affixed to the mast of a ship, without any seizure of the ship, would be considered a sufficient notice, even if the rules of court or statutes attempted to make it sufficient to support proceedings *in rem*. The courts have stated what it is that gives jurisdiction against a ship *in rem*, but affixing the copy to the mast has never been mentioned as sufficient. That is evidently done for the purpose of showing the character of the seizure, and it is an act of the same nature as producing the warrant before the master and crew (*ante*, p. 36). It seems hardly possible that a notice posted on a tree in a field or forest should be thought a sufficient notice of proceedings to try the title to the land against all persons claiming an interest.

POWER OF STATES TO DISPENSE WITH NOTICE BY CHANGE OF FORM FROM SUIT IN PERSONAM TO SUIT IN REM.

5. It is also submitted that the legislature has not the power, by changing the form of proceeding from that of a suit *in personam* to that of a suit *in rem*, to avoid the necessity of giving the actual

notice required by the Constitution in proceedings *in personam* to determine the rights of persons in property.

A majority of the court below seem to have been of this opinion (*Trans.* p. 37).

Upon this subject, the court in *Brown* v. *Levee Commissioners*, 50 Miss. p. 486-7, said : —

"It is ultra vires of the legislature to break down the essential and fundamental distinctions and differences which have always existed in the nature of judicial processes. . . .

"Our jurisprudence has always regarded suits to recover chattels or to foreclose a mortgage as personal suits, entitling the defendants to personal notice. If the legislature should enact that hereafter *they shall be* proceedings *in rem*, and that the seizure of the horse or other effects, or of the mortgaged premises, shall confer jurisdiction and operate as constructive notice, it would be too plain for argument that the legislature was without power to thus uproot and turn aside the 'due course of law.'"

In *Bardwell* v. *Collins*, 44 Minn. p. 102, the court said : —

"Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks or take away certain fundamental rights which have been always recognised and observed in judicial procedures. Hence it becomes important, in determining what kind of notice would constitute 'due process of law' in any judicial proceeding affecting a man's property, to ascertain what notice has always been required and deemed essentially necessary in actions or proceedings of that kind, according to that system of jurisprudence of which ours is derivative."

In *State* v. *Guilbert*, 56 Ohio St. p. 618, where the validity of the Ohio registration of title act was under consideration, the following language was used : —

"To say that the legislature may prescribe such notice as is appropriate to proceedings *in rem* and thus invest the proceedings with that character, is to affirm its power to annul the constitutional requirement."

Loring, J , in the court below, shows one of the consequences of admitting the power of the legislature to produce such an effect by this change of form (*Trans.* p. 53), as follows : —

"In stating that the test, and the only test, as to whether a particular proceeding is or is not a proceeding *in rem*, is this, 'Are all the world barred?' the Chief Justice tacitly recognises, that, if this proceeding is upheld as a proceeding *in rem*, it is within the constitutional power of the legislature to provide that any property within the territorial limits of the Commonwealth, real or personal, corporeal or incorporeal, may be recovered, or any titles therein or lien thereon established, in a proceeding in which no defendant need be named, and no notice need be given except notice by publication."

This is what the Supreme Court of Mississippi thought it was too plain for argument that the legislature was without power to do. (*Brown* v. *Levee Commissioners*, 50 Miss. p. 487, *supra* p. 63).

It may be added that, if this could be done, the same procedure might be applied to any action for debt or damages where property is attached to answer the judgment. The attachment creates a lien, and the action would be in substance an action to subject the property attached to satisfaction of the claim. The only process required would be a published notice to all persons interested (whether within or without the state) to show cause why it should not be so applied.

The validity of proceedings in admiralty directly against a ship, or things connected with it, without direct notice to persons adversely interested, rests upon a settled practice that existed and was sanctioned by custom long before the Constitution.

This establishes its character as due process of law, according to the rule of *Murray* v. *Hoboken Land Co.*, 18 How. 272, 276-7.

But it does not warrant the extension of the practice to other subjects where according to the usual course of the common law such a practice was not admitted, and would not be consistent with fundamental notions of justice (*Hurtado* v. *California*, 110 U.S. pp. 528, 537).

In *Murray* v. *Hoboken Land Co.*, 18 How. 272, it was held that a warrant of distress issued against the property of a collector of customs for a balance found due from him on the auditing of his accounts by an executive officer, without any judicial proceedings,

was due process of law. *Curtis*, J., showed that a diversity in the law of the land between public defaulters and ordinary debtors had long been recognised and understood, and that some summary means of enforcing payment of balances due from receivers of public money had been in use from early times (p. 278); and, having regard to the settled usages and modes of proceeding existing in the common and statute law of England prior to the emigration of our ancestors and in the laws of several of the states, the proceedings by which the warrant was issued could not be denied to be due process of law (pp. 277, 280). But it was clearly pointed out that a similar course of proceeding would not be admissible in the case of ordinary debtors, and that Congress could not withdraw the question of their liability from judicial cognisance (p. 284).

Proceedings *in rem* by the government for the condemnation of enemy's property, or of property seized for violation of the revenue or other laws, have also been in use from remote times. In the exercise of the powers of government, a more summary process is justified than is permitted to individuals in asserting their private rights. Such process is due process of law and is sanctioned by ancient usage. The rights enforced in such cases are of a different nature from any that can belong to individuals, and the difference justifies the use of a different process. It is not necessary to resort to the supposition of *Holmes*, J., in *Com.* v. *Intoxicating Liquors*, 163 Mass. p. 43, that the law treats the thing "*as being itself a subject, and as liable to offend.*" (In that case the offence of which the liquors would have been guilty was that of being kept with an intention to sell). The owner has positive duties to the government in respect of his property (*Huling* v. *Kaw Valley Ry. Co.*, 130 U.S. p. 563), and the justification of a summary course of proceeding where they are violated is found in *Murray* v. *Hoboken Land Co.*, 18 How. 272. The use of regular proceedings *in rem* to enforce these peculiar rights of government accordingly affords no analogy for authorising similar proceedings to enforce the claims of individuals. It does not even furnish a ground upon which the government might be justified in employing such proceedings to enforce its own

rights as the owner of property, where its rights are of the same nature as those of an individual.

In the case of ships and things connected with them, it is not improbable that there were reasons for allowing a course of procedure to grow up that was not consistent with the requirements of the law in other cases. Considering the manner in which the movements of property of that kind are watched and how notorious any change of possession is, it is probable that the seizure generally has had the effect of actual notice.

But the same thing cannot be said in the case of other kinds of property, least of all, in the case of land, and it is certain that no such process has ever been used. As regards land especially, nobody can say that its actual seizure would be likely to come to the notice of the persons interested in the title. Possession of it is often only constructive and has no existence apart from the title, which it is said to follow (*Munroe* v. *Ward*, 4 Allen 150, 152). The title is subject to limitations under which several persons may be entitled to future or contingent estates without any interest in the possession until those estates arise. In such cases it is not even probable that a seizure would have the effect of notice; and in a proceeding for registration, if the applicant were in possession, as he ordinarily would be, it is almost certain that a seizure would not be notice to anybody but himself.

But even in admiralty, the injustice of proceeding without actual notice to the adverse parties, where the *title* or right of possession is to be tried between opposing claimants, is recognised, as mentioned by *Loring*, J. (*Trans.* p. 52), and actual notice is required. By Adm. rule 20, the process is by arrest of the ship and a monition to the adverse parties. In *Blanchard* v. *The Cavalier*, 3 Fed. Cas. 621; 38 Hunt Mer. Mag. 325, *Betts*, J., held that this constituted a proceeding *in personam* to be litigated between the parties individually, the vessel being placed under attachment only for the purpose of being adjudged to the party entitled.

In proceedings regarding taxes, and the taking of land by the right of eminent domain, and assessments for improvements, some

otice to the owner of property affected by the proceedings has been onsidered necessary, and a general advertisement is held to be fficient. These proceedings are sometimes said to be *in rem*, nd the use of the phrase is justified by the circumstance that ey are *against the property*. But they are not judicial proceedings nd furnish no analogy by which judicial proceedings may be conucted. The state has an absolute right to impose certain obligaons on property, and the owner must see to it that he is represented hen it is called into requisition and notice by publication given.

Hagar v. *Reclamation District*, 111 U.S. 701, 708.

Huling v. *Kaw Valley Ry. Co.*, 130 U.S. 559, 563.

Bauman v. *Ross*, 167 U.S. 548, 590.

In *State* v. *Guilbert*, 56 Ohio St. p. 622, regarding proceedings for egistration of title, the court said: —

"If it is borne in mind that the questions here considered concern the dversary rights of persons in property, it will sufficiently distinguish the ases which involve the police power, or the right of eminent domain, or he right of taxation."

In *Hagar* v. *Reclamation District*, 111 U.S. p. 708, this Court lso called attention to the distinction: —

"Undoubtedly where life and liberty are involved, due process requires hat there be a regular course of judicial proceedings, which imply that the arty to be affected shall have *notice* and an opportunity to be heard; so lso where *title* or *possession* of property is involved. But when the taking f property is in the enforcement of a *tax*, the proceeding is necessarily ess formal, and whether notice to him is at all necessary may depend upon he character of the tax, and the manner in which its amount is determinable."

Other Statutes and Cases alleged to be similar in Principle.

6. It has been urged that the principle of this act is the same as that of several other statutes that have been held to be valid by different courts, and that a great number of statutes depending upon

the same principle are in actual operation in many states without any question of their validity.

But it will be seen that these statutes, as well those that have been held to be valid, as those that have not been questioned, rest upon an entirely different principle, and that, while the principle contended for has been condemned in the several cases already mentioned, it has never received judicial approval except in the decision of the majority of the court below in this case.

(1) The Illinois statute called the *Burnt Records Act* has been referred to as an act authorising a decree that would conclude all persons interested, without any notice beyond a published notice addressed generally to all whom it may concern, and it has been asserted that the validity of such proceedings was established by the decision of this Court in *Gormley* v. *Clark*, 134 U.S. 338. But no such question was involved or alluded to in that case. The principal question was whether a case under this act could be brought in a United States court, and this was decided in the affirmative, as the case was in substance a suit in equity. This being decided and the parties being before the court, there was no reason why a decree should not be made that would bind them, even though a decree in some other case might not bind parties not properly served. It was not necessary for the successful working of that act in *any* case, that decrees under it should be beyond question in *all* cases. In the Illinois courts this act was upheld as to parties without notice, on the ground, not that the process was sufficient, but that it limited a time within which proceedings might be taken, the court saying: "The position taken that the Burnt Records Act is unconstitutional is not sustained. It is, in effect, *a statute of limitations*, and, under the circumstances, was not unreasonable" (*Bertrand* v. *Taylor*, 87 Ill. 235).

This act probably served as the model for the Illinois registration of title act (Illinois Laws 1897, p. 139) which depends for its effect upon the limitation of time, as against persons without notice, and not upon the conclusiveness of the decree. (*People* v. *Simon*, 176 Ill. 165; *ante*, p. 19.)

The bill pending in Congress (Senate 131) concerning land titles

in the District of Columbia, is the same as the Illinois act just mentioned, slightly altered to adapt it to the District of Columbia. The adaptation has not been completed, and some of the provisions of the bill (*e. g.* ss. 97, 100, 101) still refer to the municipal divisions, officers, and public securities of Illinois. The decision as to the validity of the Illinois act turned on s. 26, which is the same as s. 26 of the bill.

(2) The Massachusetts statutes concerning *Partition* provide that if any of the persons interested are *absent* from the state, or if the names of any of them are *unknown* to the petitioner, the court shall order notice to be given to them by publication or otherwise (P. S. c. 178, s. 9). It has never been determined that a judgment after notice by publication alone (s. 35) would be conclusive against persons resident in the state and *known* to the petitioner but not served with process, as to either their rights of property or the allotment of their undisputed shares.

The cases upon the statute involve no constitutional question. In *Cook* v. *Allen*, 2 Mass. 462, the question was whether a judgment in partition, under the statute then in force, bound one who claimed to hold in severalty and who did not appear, though *he had actual notice* (pp. 464, 471); and it was held that his right of *possession* was concluded, and that he could assert his right of *property* only by a writ of right (pp. 472–473). In *Dascomb* v. *Davis*, 5 Met. 335, the only question was whether the partition gave a right of possession sufficient to support an action of trespass. And in *Foster* v. *Abbot*, 8 Met. 596, where an attempt was made to attack a partition collaterally by writ of entry, on the ground that it was only against persons *unknown*, whereas the petitioner *knew* the parties in interest, and they had no notice, it was held that the effect of the alleged want of notice could not be decided in a collateral proceeding, and that the judgment in partition was valid until reversed on a writ of error. The case turned on a question of procedure and recognised the right of the plaintiffs to get rid of the judgment improperly obtained. Since the 14th Amendment such a judgment would probably be treated as void without the necessity of resorting to a writ of error (*Needham* v. *Thayer*, 147 Mass. 536).

The statutes do not profess to allow service merely by publication, except in the cases of *absent* and *unknown* parties, in which such service has been held admissible on the ground of necessity (*ante*, p. 11).

Even in the cases where such service is permitted by the statutes, the partition concludes absent parties only so far as the allotment of their shares is concerned, and not as to their right of property in any share or in severalty, and a time is prescribed within which parties out of the state can claim a new partition (P.S. c. 178, ss. 36, 38, 39, 41).

These statutes, and their origin and effect, are elaborately considered by *Loring*, J. (*Trans.* p. 54), and he shows that they do not affect the question in this case.

(3) The *Distribution of a Trust Fund* under the direction of the court is sometimes referred to as a case in which the courts determine the rights of persons interested after a general notice given only by publication. But the decree of the court, although it protects the trustee, does *not* conclude the rights of persons that are not actually reached by the advertisement, and they are at liberty to go against the parties that have received the fund under the decree.

Williams v. *Gibbes*, 17 How. 239, 254–257.

David v. *Frowd*, 1 M.& K. 200, 208–9.

Mohan v. *Broughton* [1900] P.D. 56, affirming [1899] P.D. 211.

2 Dan. Ch. P. (4th Am. ed.) 1206.

In *Williams* v. *Gibbes*, 17 How. p. 256, *Nelson*, J., speaking of the effect of a general notice by advertisement that does not reach the parties really entitled, quoted the remark of *Leach*, M.R., that

"it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owners to one who has no right to it."

(4) In the court below a great many statutes of different states were referred to for the purpose of showing that provisions for binding persons by judicial proceedings without any notice otherwise than by publication in a newspaper, were common in many states,

and that their validity was thus generally recognised. But no one of these statutes made it possible to deprive any man of his property by such means, where he was a resident of the state and there was no obstacle to serving him with process in the usual way.

(*a*) By far the greater number of these statutes related to cases where the person was *unknown* and could not be ascertained with reasonable diligence, and in such cases notice by publication was allowed in substantially the same manner as where the defendant was out of the jurisdiction. The validity of notice by publication in such cases was recognised on the ground of necessity, in *Brown* v. *Levee Commissioners*, 50 Miss. p. 485, and *State* v. *Guilbert*, 56 Ohio St. p. 620, 621, but it was held that such publication was not valid notice where the necessity did not exist. The Minnesota statute, which was sustained in *Shepherd* v. *Ware*, 46 Minn. 174 (*supra*, p. 11), was in its terms the broadest of these statutes, but its effect and the validity of proceedings under it were strictly limited by the court. The Mississippi statute enforced in *Belcher* v. *Mhoon*, 47 Miss. 613, expressly required that "persons interested in such lands, *residing in this state*, shall be made parties *by name* and *served* with process, unless the complainant or complainants shall make affidavit that their names are *unknown;* and *non-residents* having claims to the lands shall also be made parties *by name*, and publication be made for them as in other cases in chancery, unless a like affidavit be made by the complainant or complainants that their names are *unknown*." None of these statutes or decisions gives any color for saying that a judgment obtained under them against *unknown* persons would bind persons that were in fact *known* or might by reasonable diligence be known.

(*b*) The Texas statute relating to *Escheats*, which was the subject of *Hamilton* v. *Brown*, 161 U.S. 256, and similar statutes of some other states, were also referred to. Such statutes and their relation to the questions involved in this case have already been considered (*supra*, p. 48).

(*c*) The statutes authorising courts in general terms to direct notice either by *personal service or by publication* do not empower them to dispense with personal service where it is practicable, and

to direct notice by publication alone in all cases. The provision as to publication is limited by implication to cases in which that mode of service is proper, in the same manner as a provision for notice to *non-resident* defendants was limited in *Roller* v. *Holly*, 176 U.S. 398, 406, to cases where suits may be properly instituted against non-residents. It is well known to be the practice of the courts to direct notice by publication only in such cases, and to require actual service where it is practicable.

(*d*) The statutes by which a judgment obtained after a published notice is made only *prima facie* evidence against parties not actually served, or (*e*) persons out of possession are excluded by a *limitation of time*, or (*f*) property is taken for public purposes by *taxation* or the right of *eminent domain*, do not require further consideration.

None of the statutes referred to assume to authorise a judgment against the title of any person to property without notice otherwise than by publication in any case where actual notice is practicable.

The statutes that have attempted to do this have been held to be unconstitutional in every case where they have come before the courts down to the decision of the court below in the present case (viz. *Webster* v. *Reid*, 11 How. 437; *Brown* v. *Levee Commissioners*, 50 Miss. 468; *Bardwell* v. *Collins*, 44 Minn. 97; *State* v. *Guilbert*, 56 Ohio St. 575).

CONCLUSIVE EFFECT OF REGISTRATION OF SUBSEQUENT DEALINGS.

7. *The Second Objection* to the validity of the act is that the registration of dealings with registered land, after the original registration, would in certain cases have the effect of depriving the registered owners of their property without due process of law.

Subsequent dealings with the land are effected, as already set out (*supra*, p. 4), by entries made by the recorder or assistant recorders upon the certificate of title in pursuance of deeds and other instruments similar to those now in use for the like purpose (s. 50),

and upon a conveyance in fee the new owner receives a new certificate of title (s. 57). The entries of the recorder and assistant recorders are effectual to transfer or affect the land (s. 50), and their certificates and memoranda on them bind the registered owner and all persons claiming under him in favor of bona fide purchasers (ss. 39, 55), except in the case of a registration obtained by forgery *after* the original registration (s. 55).

Whenever a conveyance is presented to an assistant recorder for registration, he is obliged to determine whether upon its true construction the land described in it is the same as that comprised in the certificate or part of it, and whether the estate conveyed is an estate in fee simple or for life or otherwise, and whether the grantor actually has the estate he assumes to convey or the power to convey it. He must ascertain that the grantor did not execute it under such a mistake as to its character as would render it void (*Foster* v. *Mackinnon*, L.R. 4 C.P. p. 711). He must determine whether he is married or not; and, if he is married and the conveyance is executed by some person as his wife, he must ascertain that such person is really his wife. If the conveyance is executed by attorney (s. 104), he must determine whether the power of attorney is applicable to the land comprised in the conveyance, and whether it authorises the intended transfer. When a conveyance upon sale under a mortgage is to be registered, he must also determine that the circumstances authorised the sale, and that the power has been strictly followed. In acting on the affidavit, which is only prima facie evidence (P.S. c. 181, s. 18), he determines that the facts are as stated in it. When a conveyance is made under a power in a deed or will, he must determine that the true construction of the power and the circumstances existing at the time are such that the conveyance is authorised.

It may be that none of these questions will occur to the assistant recorder or be raised before him. But they will be *absolutely concluded* by the entry that he makes in the register. If he issues a new certificate to the purchaser, the estate specified in it will pass to him, although the conveyance upon which it was founded did not,

according to its true construction, purport to transfer either t whole of the land or the estate specified in the certificate, althou the grantor did not have the estate he assumes to convey or t power to deal with it, and although the conveyance was in the c cumstances absolutely void.

"Every applicant receiving a certificate of title in pursuance of decree of registration, and *every subsequent purchaser* of register land who takes a certificate of title for value and in good faith, *sh hold the same* free from all incumbrances except those noted on t certificate," &c. (s. 39). "The act of *registration*" by the record or assistant recorder, and not the instrument executed by the grantc is "the *operative act* to convey or affect the estate" (s. 50). A "the new certificate or memorandum shall be binding upon t registered owner and upon all persons claiming under him, in fav of every purchaser for value and in good faith" (s. 55).

The assistant recorder may register an estate in fee simple whe the conveyance, according to its true construction, transfers only life estate, or he may include in the registration a larger or differe part of the land comprised in the previous certificate than the co veyance authorises. He may register a conveyance under a powe where, according to the true construction of the power or in th existing circumstances, the grantor could not properly make suc conveyance. The conveyance may be contrary to the rights of wife or husband, or of a mortgagor or mortgagee, or may be on that is in fact absolutely void. But the registration vests the estat in the registered owner, and excludes the rights of others.

The persons entitled to the land under the previous registratio are thus deprived of their property, and all these proceedings ma take place in their absence and without their having any notice o the proposed registration or any opportunity to protect themselves These persons may be tenants in common or joint tenants with th person by whom the conveyance is executed, or may be entitle to future interests indefeasibly or in default of the exercise o a power that the conveyance purports to exercise, and they ma be ignorant that the conveyance was made or intended. Th persons to whom the future interests are limited may even b

unborn. So far as any interest is transferred by the act of registration in excess of what would have passed by the conveyance independently of the act, that interest is taken away from the owner by the arbitrary act of the recorder and transferred to the newly registered owner. This is not due process of law.

The legislature cannot provide "that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B."

Davidson v. *New Orleans*, 96 U.S. p. 102.

Chicago, Burlington, & Quincy Rld. Co. v. *Chicago*, 166 U.S. pp. 235, 237.

Wilkinson v. *Leland*, 2 Pet. p. 658.

So it cannot provide that the title of A shall be vested in B by an improper act of a recorder.

It is the clear intention of the act that the registration shall have this effect, for it gives compensation to the rightful owners *deprived* of their property through *fraud*, *error*, *omission*, *mistake*, *or misdescription* in the registration of any other person (s. 96). And this effect is necessary in order to carry out the purpose of giving to a purchaser absolute certainty that he acquires the title stated in the certificate.

Thus, in giving to purchasers greater security in *acquiring* a good title, the act takes away from owners part of the security they now have in *keeping* the title they have got.

No other property is subject to transfer in any such manner. The nearest resemblance is found in the transfer of shares in companies, but in that case the mistake or fraud of the transfer agent does not give the title to the transferee. If the transfer that is registered is unauthorised, the title of the true owner is not affected, and the issue of the new certificate to the transferee only gives *him* a right to compensation. But under this act the mistake or fraud of the assistant recorder transfers the title from the owner to the person in whose name it has been improperly registered, and gives the *owner* the right to compensation.

The land of which the owner is thus deprived is not taken for any public purpose, but for the private purposes of the purchaser. The state has no right to take private property from the owner without his consent and require him to accept compensation in its place, unless the purpose to which the property is to be applied, is a public one.

Missouri Pacific Ry. Co. v. *Nebraska*, 164 U.S. 403, 417.
Lowell v. *Boston*, 111 Mass. 454.

The compensation clauses are therefore immaterial.

TENURE.

This objection is disposed of in *People* v. *Simon*, 176 Ill. 165, 176–7, as a mere question of *tenure*. The court says that so long as vested rights are not disturbed, the law may at any time change the tenure of land, the conditions of alienation, and the rules of evidence for determining the title. The theory of the act, as the court understood it, was that, after the true state of the title had been ascertained and declared, "the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed" (p. 176), and accordingly the court saw "no reason why the transfer of real estate may not be made in the way contemplated" (p. 177).

It is not a rule of tenure that secures the owner against being deprived of his property without due process of law. It is the provision of the Constitution that protects him. The legislature cannot make a rule of tenure or of property that is contrary to the Constitution. If the legislature enacts that property shall not be hereafter acquired except on the terms that the owner may be deprived of it without due process of law, the enactment is itself in conflict with this provision of the Constitution.

This Court says, in *Holden* v. *Hardy*, 169 U.S. p. 391,

"As the possession of *property*, of which a person *cannot be deprived* doubtless implies that *such property may be acquired*, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property, would also be obnoxious to the same provision. Indeed we may go a step further, and say that, as property can only be

legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

REASONS OF THE MAJORITY OF THE COURT BELOW.

The majority of the court below add the following arguments against this objection: —

(*a*) It should be observed that by s. 55, the production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, is *conclusive authority* from the registered owner for the entry of a new certificate or the making of a memorandum of registration." (*Trans.* p. 38.)

The act says (s. 55) that the production of the duplicate certificate, when the voluntary instrument is presented, shall be conclusive authority "to enter a new certificate or to make a memorandum of registration *in accordance with such instrument*." It does not say that the production of the certificate shall be conclusive authority to make mistakes or commit frauds, or to make any entry contrary to the terms of the instrument. Yet if the recorder by mistake or fraud makes a wrong entry, the holder of the new certificate acquires a good title, and the person deprived of it is driven to compensation out of the fund.

Then too the conclusive authority inferred from the production of the duplicate certificate can only be that of the owner of the certificate produced. When there are several owners in common or otherwise, and separate duplicates are issued to them according to s. 43, the production of the duplicate certificate of one of them cannot be conclusive authority from the others. Accordingly if one of three tenants in common undertakes to convey one half or the whole, instead of one third, or if a tenant for life, with a power to appoint in fee simple in certain circumstances, assumes to convey an estate in fee simple in other circumstances, the production of that person's duplicate is no authority from the other persons interested to make an entry of a transfer in excess of the estate or power of the owner of the duplicate. Still a wrong entry by the recorder will pass the estate.

Moreover this provision is an arbitrary attempt to create by statute

a conclusive presumption of fact, by which a man may be deprived of his property. It may be competent for the legislature to provide that the production of the certificate shall be *prima facie* evidence, but it cannot make such production *conclusive* evidence that an authority has been given when in fact it has not been given (*Marx* v. *Hanthorn*, 148 U.S. 172; Cooley Const. Lim. (6th ed. 1890) 452). The owner's duplicate certificate may be taken without his knowledge or consent, and even when he is incapable from illness or otherwise of preventing the taking or the improper use of it. It is possible to suppose the case of an undelivered deed taken with the duplicate certificate and registered during the owner's illness or after his death. An original applicant for registration may by his application consent that possession of the certificate shall be conclusive evidence of authority as against him. But future owners do not give any such consent, and he cannot bind them by his consent.

(*b*) It is also said, "By s. 45 the obtaining of a decree of registration, which is a voluntary act, is *an agreement running with the land* that the land shall be and remain registered land and subject to the provisions of the act." (*Trans.* p. 38.)

How does this provision of the act affect the question? Independently of the act, no covenant or agreement that the applicant for registration could make with the state, or with any prior owner or anybody else, would so bind the future owners through all time than they could be deprived of their property by the act of some person holding at the time the office of recorder. No such liability can be annexed to the title by a covenant or agreement running with the land. A covenant does not run with the land unless the person with whom it is made has some interest in the land and the covenant relates to that interest (*Bronson* v. *Coffin*, 108 Mass. p. 180; *Norcross* v. *James*, 140 Mass. p. 190–191). The state has no interest in the land; the prior owner, when he conveyed it, parted with all he had; and the covenant or agreement creates no easement or other right in the land. If an owner of land should make such a covenant or agreement with anybody, although it purported to bind his heirs and assigns, a subsequent purchaser would not be bound by it. The reference to "an agreement running with the land" therefore has no effect so far as future owners are concerned.

The act, in saying that an agreement running with the land shall e implied from the acts of the applicant, is in reality only declaring hat future owners shall be subject to liability under an agreement o which they are not parties. That is the same thing as imposing the iability directly by force of the act, without reference to any greement.

If no such provision had been inserted in the act, the registration of the land, upon the application of the owner, would have subjected it to all the provisions of the act, unless they were contrary to the Constitution. By his application he would have agreed to the provisions concerning subsequent dealings with the land, whether the provisions would otherwise have been contrary to the Constitution or not, and no constitutional right of his would be violated if he were afterwards deprived of his land, in any way according to those provisions. But his agreement would not bind subsequent owners, for they were not parties to it, and they would be protected by the Constitution if the act contained any provisions by which they might be deprived of their interest in the land without due process of law. It could not be said that they assented to these provisions by taking a title that had been registered. That would be equivalent to saying that the state can, with the assent of the present owner, annex a new quality to the land by which no interest afterwards acquired in it would be protected by the Constitution. If the state can do that with the assent of the present owner, it can do so on his death without his consent, for the state has absolute power to determine how property shall devolve upon the death of the owner (*U.S.* v. *Perkins*, 163 U.S. p. 628). But the state has no power to annex conditions or incidents to property that are in conflict with the Constitution, either with the present owner's consent in his lifetime, or without it at his death.

(c) Finally it is said, "Furthermore in deciding whether *substantial justice* is done, it is to be borne in mind that *ordinary cases* will present no question at all. It is contemplated, as we have said, that if there is a question to be discerned it shall be referred to the court, and of course the court will order notice to any party interested." (*Trans.* p. 38.)

The first part of this sentence seems to assume that substantial justice is done if rights of property are not violated in ordinary cases, and that it is not material if they are occasionally violated in other cases. But the Constitution protects all persons, and prohibits a state from depriving any person of his property without due process of law. If the act contains provisions by which any one person can in any case be so deprived of his property, it is contrary to this clause of the Constitution. This is clearly shown by *Loring*, J., in the court below (*Trans.* p. 48).

As to referring questions to the court, the act only provides that this shall be done "where the assistant recorder *is in doubt* upon any question, or where any party in interest does not agree as to the proper memorandum to be made" (s. 53). But the assistant recorder might not be in doubt, even in cases of difficulty, and he might not see the question at all. The act contemplates that he shall determine the matter in all cases where he is clear and nobody raises a question. If he acts without referring any question to the court, although in fact a difficult question is involved, his entry in the register passes the title, and the holder of the new certificate holds it free of all claims of persons entitled under the previous certificate (ss. 39, 55).

Moreover a reference of a question to the court does not necessarily secure notice to all persons interested. The act provides that the court, "after notice to all parties and a hearing," shall enter an order, and the assistant recorder "shall make registration in accordance therewith" (s. 53). But the court may not ascertain correctly what persons are interested in the question, or there may be some defect in the service of the notice upon the persons to whom it is directed. The act does not make the validity of the registration depend upon the due service of notice upon all persons actually interested. The issue of a new certificate, whether issued by the assistant recorder on his own responsibility or by order of the court, vests the title in the purchaser absolutely, and he is not bound to see to the regularity of the previous proceedings.

There is no justification for thus taking away from the holders of registered titles the security to which they are entitled under the Con-

itution. Even if the constitutional provision stood in the way of tablishing a system of registration of title, that would not be a suffi-ent reason for disregarding it. But it is perfectly feasible to have system of registration by which a purchaser shall be secured acquiring a good title, and at the same time the holder of any tle shall be as secure in holding it as he is now. When registration f title was first talked of, it was said that the transfer of land might e made as simple and secure as the transfer of shares in companies. But no shareholder can be deprived of his shares by mistakes or fraudulent entries in the register. Mistakes and frauds sometimes occur, but they do not deprive anyone of shares that belong to him, although a new certificate may have been issued to the purchaser. The loss of the shares falls on the purchaser, and he is thereby entitled to compensation. The same principle is applicable to the registration of land. The purchaser would get all the security that the present act now provides for an owner deprived of his property under its provisions, and the owner would be as secure against deprivation as he is now.

VALIDITY OF THE WHOLE ACT AFFECTED BY EACH OBJECTION.

8. If the provisions of the act are invalid as regards the conclusiveness of either (1) the original registration or (2) the registration of subsequent dealings, then the whole act is invalid, for the entire system established by it is dependent on the absolute conclusiveness of these two things, and the act entirely fails in its purpose if this conclusiveness is not obtained.

Warren v. *Charlestown*, 2 Gray 84, 99–100.
Nolan's Case, 122 Mass. 330, 332–3.
Trade Mark Cases, 100 U.S. 82, 98–99.
Virginia Coupon Cases, 114 U.S. 269, 304–5.

The object of the original registration is to obtain such an absolute certainty of title that the certificate may be relied on in all future dealings as conclusive evidence of title, and that examination of title on each transfer may be done away with. A decree that was

conclusive as to some persons and not as to others would be useless, for purchasers would still be obliged to investigate the title in the ordinary way, in order to be sure that there were not persons having an interest and not concluded by the decree.

Quoting from the brief of the Attorney General in the court below, "The efficacy of the Torrens System consists in this, that it provides a method of posting up titles to date. This posted-up title, good against everyone, is the root of title, back of which there is no need of going. The way in which this root is obtained is by a judicial proceeding establishing absolutely and against all the world, after the most complete and general notice possible, the state of the title. . . . It is a necessity and indeed the life of the system that all persons should be concluded by the decree."

The registration of subsequent dealings has the same object as the original registration.

If the subsequent dealings with the land cannot be had in the manner and with the conclusive effect declared in the act, the whole purpose of registration fails.

Under the provisions of the act the only manner in which subsequent dealings can be effected is by entries made by the recorder or assistant recorder (s. 50), and these entries are made conclusive (ss. 55, 39). There is no other way in which registered land can be effectually transferred at all (s. 50), and no land once registered can be withdrawn from registration (s. 45).

The Ohio act was held to be entirely void in *State* v. *Guilbert*, 56 Ohio St. 575, 630.

In the Illinois case (*People* v. *Simon*, 176 Ill. 165, 176) it would have been unnecessary to consider the second objection if the act could have been upheld without disposing of it.

PROHIBITION.

9. As the Court of Registration is without jurisdiction to deal with the matters involved in the case before it, prohibition, which lies to all inferior tribunals (*Connecticut River Rld. Co.* v. *County*

Com., 127 Mass. 50, 57–60), and even to a pretended court (*Chambers* v. *Jennings*, 2 Salk. 553), is the proper remedy.

See also *Mayor of London* v. *Cox*, L.R. 2 H.L. 239.
Hyde Park v. *Wiggin*, 157 Mass. 94.

It is not necessary that the question of jurisdiction should be raised in the inferior court, for the party may at his option either plead there or apply for a prohibition (*Mayor of London* v. *Cox*, L.R. 2 H.L. pp. 275–291, where the opinion of the judges by *Willes*, J., was adopted by the House of Lords, p. 294). "The rule is, that where want of jurisdiction is apparent upon the proceedings, prohibition goes at any time after service of the process, and even before articles 'because it is much better for the party to apply for prohibition in the first stage than after expense is incurred'" (p. 281). (See also *Connecticut River Rld. Co.* v. *County Com.*, 127 Mass. p. 59.) In the present case the inferior court was not legally competent to entertain any question whatever.

The present applicant is one of the adjoining owners, against whom the process runs (s. 31, form), and a party defendant (s. 35). He is summoned into court for the purpose of having the boundaries of his land determined (s. 36); and the decree, which might take from him a part of what he claims as his land, is intended to be binding on him (s. 38). He makes this application for a prohibition in order that he may not be obliged to litigate that question in a court that is without jurisdiction to deal with it. As the want of jurisdiction appears on the face of the proceedings, he is entitled to a writ of prohibition.

Mayor of London v. *Cox*, L.R. 2 H.L. p. 278.
Smith v. *Whitney*, 116 U.S. p. 173.
In re Rice, 155 U.S. p. 402.

It is submitted that the judgment of the court below should be reversed and the case remanded with directions to enter a judgment awarding a writ of prohibition, as in *Furman* v. *Nichol*, 8 Wall. 44, 64.

J. L. THORNDIKE.

APPENDIX

1898, c. 562.

An Act to provide for registering and confirming titles to land.

1. This act may be cited as the Land Registration Act.

COURT OF REGISTRATION.

2. A court is hereby established, to be called the Court of Registration, which shall have exclusive original jurisdiction of all applications for the registration of title to land within the Commonwealth, with power to hear and determine all questions arising upon such applications, and also shall have jurisdiction over such other questions as may come before it under this act, subject however to the right of appeal, as hereinafter provided.*

The court shall hold its sittings in Boston, but may adjourn from time to time to such other places as the public convenience may require. In the county of Suffolk the board of aldermen of the city of Boston, and in other counties the county commissioners, shall provide suitable rooms for the sittings of the Court of Registration, in the same building with or convenient to the Probate Court or the Registry of Deeds, and shall provide all necessary books and such printed blanks and stationery for use in registration proceedings as may be ordered by the court.

The court shall have jurisdiction throughout the Commonwealth, and shall always be open, except on Sundays and holidays established by law. It shall be a court of record, and shall cause to be made a seal, and to be sealed therewith all orders, process and papers made by or proceeding from the court and requiring a seal. All notices, orders and process of said court may run into any county and be returnable as the court may direct.

The court shall from time to time make general rules and forms for procedure, conforming as near as may be to the practice in the probate courts, but subject to the express provisions of this act and to general laws. Such rules and forms before taking effect shall be approved by the Supreme Judicial Court or a justice thereof.

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* *The following is added by* 1899, c. 131, s. 1, "The proceedings upon such applications shall be proceedings *in rem* against the land, and the decrees shall operate directly on the land and vest and establish title thereto."

In this act, except where the context requires a different cons
tion, the word court shall mean the Court of Registration.

3. The governor, with the advice and consent of the cou
shall appoint two judges of the Court of Registration, one of w
shall be appointed, commissioned and qualified as judge of regi
tion, and the other as assistant judge of registration, each to
his office during good behavior; and any vacancy shall be fille
the manner provided by the constitution.

4. The authority and jurisdiction of the Court of Registra
shall begin and take effect as soon as the judges thereof are appoi
and qualified. The court may be held by a single judge, and w
so held shall have all the authority and jurisdiction committe
said court. Different sessions may be held at the same time, ei
in the same county or in different counties, as the judges
decide, and they shall so arrange the sessions as to insure a pro
discharge of the business of the court.

5. Citations, orders of notice, and all other process issuing f
the court shall bear test of the judge of registration, and be un
the seal of the court and signed by the clerk.

6. In case of a vacancy in the office of judge of registration,
of his absence or inability to perform his duties, the assistant ju
shall perform them, until the vacancy is filled or any disabilit
removed.

7. The governor, with the advice and consent of the coun
shall appoint a recorder, who shall be clerk of the court, and w
shall hold his office for the term of five years. He shall attend
sessions of the court and keep a docket of all causes, and shall a
the seal of the court to all process or papers proceeding therefr
and requiring a seal.

8. The recorder shall be under the direction of the court, a
shall have the custody and control of all papers and documents fil
with him under the provisions of this act, and shall carefully nu
ber and index the same. Said papers and documents shall be ke
in Boston in an office to be called the Land Registration Offic
which shall be near the Court of Registration. The recorder sh
have authority, with the sanction of the court, to employ such assi
tants and messengers as may be necessary.

9. The recorder may act in any county, and after land has be
registered under this act he may make all memoranda affecting t
title, and enter and issue certificates of title as provided herein.

10. The registers of deeds in each registry district, after a
land within their respective districts has been registered under th
act, shall have the same authority as the recorder to make all m
moranda affecting the title of such land, and to enter and issue ne
certificates of title as provided herein, and to affix the seal of t
court to such certificates and duplicate certificates of title; but i
executing the provisions of this act the registers of deeds shall h

subject to the general direction of the recorder, in order to secure uniformity throughout the Commonwealth; and their official designation shall be assistant recorders for the registry district in which they are severally registers of deeds. In case of the death or disability of the recorder the assistant recorder for the Suffolk district shall perform the duties of the recorder until the vacancy is filled or the disability removed.

11. The recorder and all assistant recorders shall be sworn before the judge of registration, and a record thereof shall be made. They shall give bond in a sum to be fixed by the court, for the faithful performance of their official duties, before entering upon the same. They may administer oaths in all cases in which an oath is required, to persons appearing before them in matters pertaining to the registration of land. They shall keep accurate accounts of all moneys received as fees or otherwise, which shall be subject to examination by the controller of county accounts, in the same manner as accounts of registers of deeds, and they shall pay over such moneys quarterly to the treasurer of the Commonwealth. In case of the absence of any assistant recorder the assistant register for the district, or if there is no assistant register the person acting as clerk in the office of the register of deeds, shall perform the duties of the assistant recorder, and the assistant recorder shall be responsible for him.

12. The judge of registration may appoint one or more examiners of title in each county, who shall be attorneys at law, and shall be subject to removal by the Supreme Judicial Court.

13. The salary of the judge of registration shall be forty-five hundred dollars a year. The salary of the assistant judge of registration shall be four thousand dollars a year. The salaries of the recorder, assistant recorders, examiners of titles, and all assistants and messengers shall be fixed by the governor and council. All salaries and expenses of the court shall be paid from the treasury of the Commonwealth.

14. Every order, decision and decree of the Court of Registration shall be subject to appeal to the Superior Court for the county where the land lies, concerning which the order, decision or decree appealed from was made. The appeal shall be claimed and entered within thirty days from the date of such order, decision or decree, and the party appealing shall at the time of entering his appeal file in the Superior Court copies of all material papers in the case, certified by the recorder. Appearances and answers shall be filed in the Superior Court within thirty days after the appeal is entered, unless for good cause further time is allowed, and upon the motion of either party the cause shall be advanced for speedy hearing, and shall be tried by the court, unless either party within the time allowed for entering appearance claims trial by jury, in which case issues for the jury shall be framed. Questions of law arising in the Superior Court may be taken to the Supreme Judicial Court for revision by

any party aggrieved, in the same manner as in proceedings at l in the Superior Court.*

15. At the end of the proceedings on appeal the clerk of [*Superior* †] Court shall certify to the Court of Registration final decision on the appeal, and the Court of Registration shall en the final decree in the cause, in accordance with the certificate of clerk of the [*Superior* †] Court.

16. If the party appealing does not duly prosecute his app within the time limited the original order, decision or decree sh stand as if no appeal had been taken.

17. The Court of Registration in all matters over which it h jurisdiction may enforce its orders or decrees, in the same mann as decrees are enforced in equity, and upon the request of the jud of registration the sheriff of any county shall assign a deputy attend the sittings of the court in that county.

18. Costs shall be taxed as in the Superior Court sitting equity, where no different provision is made.

ORIGINAL REGISTRATION.

19. Application for registration of title may be made by t following persons, namely:

First. The person or persons claiming, singly or collectively, own the legal estate in fee simple.

Second. The person or persons claiming, singly or collectivel to have the power of appointing or disposing of the legal estate fee simple.

Third. Infants and other persons under disability may mak application by their legally appointed guardians; but the person whose behalf the application is made shall be named as applicant.

Fourth. Corporations may make application by any officer dul authorized by a vote of the directors: provided, however, that on or more tenants for a term of years, which is regarded as a fe simple in section one of chapter one hundred and twenty-one of th Public Statutes, shall not be allowed to make application excep jointly with those claiming the reversionary interest which makes u the fee simple at common law; nor shall a mortgagor make appl cation without the consent in writing of the mortgagee; nor a ma

* *The following is added by* 1899, c. 131, s. 2, "Questions of law arising i the Court of Registration on any decision or decree may be taken by any part direct to the Supreme Judicial Court for revision, in the same manner as que tions of law are taken to that court from the Superior Court. The Court Registration after any decision or decree dependent upon the determination questions of law may report such decision or decree for the consideration the full bench of the Supreme Judicial Court, with so much of the case as necessary for understanding such questions of law."

† *The word* "appellate" *is substituted for the word* "Superior" *by* 189 c. 131, s. 3.

ried woman without the consent in writing of her husband, unless she holds the land as her separate property or has a power to appoint the same in fee simple, or has obtained a decree of the Probate Court under the provisions of chapter two hundred and fifty-five of the acts of the year eighteen hundred and eighty-five, as amended by chapter two hundred and ninety of the acts of the year eighteen hundred and eighty-seven; nor one or more tenants claiming undivided shares less than a fee simple in the whole land described in the application.

20. The application may be filed with the recorder, or with the assistant recorder at the registry of deeds for the district in which the land, or any portion thereof, lies. Upon filing his application the applicant shall forthwith cause to be filed in the registry of deeds for the said district or districts a memorandum stating that application for registration has been filed, and the date and place of filing, and a copy of the description of the land contained in the application. This memorandum shall be recorded and indexed by the register with the records of deeds. Each assistant recorder shall also keep an index of all applications in his district, and in every case where the application is filed with him shall, [*after recording*,*] transmit the same, with the papers and plans filed therewith,† to the recorder.

21. The application shall be in writing, signed and sworn to by the applicant or by some person duly authorized in his behalf. If there is more than one applicant the application shall be signed and sworn to by or in behalf of each. It shall contain a description of the land, and shall state whether the applicant is married; and if married the name of the wife or husband; and if unmarried whether he or she has been married, and if so, when and how the marriage relation terminated; and if by divorce, when, where and by what court the divorce was granted. It shall also state the name in full and the address of the applicant, and also the names and addresses of the adjoining owners and occupants, if known; and if not known it shall state what search has been made to find them. It may be in form as follows:

COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Judge of the Court of Registration.

I (or we) the undersigned, hereby apply to have the land hereinafter described brought under the operation and provisions of the land registration act, and to have my (or our) title therein registered and confirmed. And I (or we) declare: (1) That I am (or we are) the owner (or owners) in fee simple of a certain parcel of land with the buildings (if any, and if not, strike out the clause), situate in (here insert accurate description). (2) That said land at the last assessment for taxation was assessed at dollars; and the buildings (if any) at dollars. (3) That I (or we) do not know of any

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* *These two words are struck out by* 1899, c. 131, s. 4.

† *The following is inserted by* 1899, c. 131, s. 4, "and such memorandum when recorded."

mortgage or encumbrance affecting said land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy. (If any, add "other than as follows," and set forth each clearly.) (4) That I (or we) obtained title (if by deed, state name of grantor, date and place of record, and file the deed or state reason for not filing. If in any other way, state it. (5) That said land is occupied. (If occupied state name in full and place of residence and post office address of occupant and the nature of his occupancy. If unoccupied, insert "not.") (6) That the names in full and addresses as far as known to me (or us) of the occupants of all lands adjoining said land are as follows: (Give street and number wherever possible. If names not known state whether inquiry has been made, and what inquiry. (7) That the names and addresses so far as known to me (or us) of the owners of all lands adjoining the above land are as follows: (Same directions as above.) (8) That I am (or we are) married. (Follow literally the directions given in section twenty-one of the land registration act.) (9) That my (or our) full name (or names), residence and post office address is (or are) as follows:

Dated this day of in the year eighteen hundred and ninety-

(Schedule of documents.) (Signature.)

COMMONWEALTH OF MASSACHUSETTS.

, ss. 19 ,

Then personally appeared the above named , known to me to be the signer (or signers) of the foregoing application, and made oath that the statements made therein, so far as made of his (or their) own knowledge are true, and so far as made upon information and belief, that he (or they) believe them to be true, before me,

Justice of the Peace.

22. If the applicant is not a resident of the Commonwealth he shall file with his application a paper appointing an agent residing in the Commonwealth, giving his name in full and post office address, and shall therein agree that the service of any legal process in proceedings under or growing out of the application shall be of the same legal effect when made on said agent, as if made on the applicant within the Commonwealth. If the agent dies, or removes from the Commonwealth, the applicant shall at once make another appointment; and if he fails to do so the court may dismiss the application.

23. Amendments to the application, including joinder, substitution, or discontinuing as to parties, shall be allowed by the court at any time upon terms that are just and reasonable; but all amendments shall be in writing, signed and sworn to, like the original.

24. An application may include two or more contiguous parcels of land * within the same registry district. But two or more persons claiming in the same parcels different interests, which collectively make up the legal estate in fee simple in each parcel, shall not join in one application for more than one parcel unless their interests are alike in each and every parcel. The court may at any time order

**Amended by inserting the words,* "or two or more parcels constituting one holding under one and the same title." 1899, c. 131, s. 5.

an application to be amended by striking out one or more of the parcels, or by a severance of the application.

25. If the application describes the land as bounded on a public or private way it shall state whether or not the applicant claims any and what land within the limits of the way, and whether the applicant desires to have the line of the way determined.

26. The applicant shall file with the application a plan of the land, and all original muniments of title within his control mentioned in the schedule of documents. Such original muniments as affect land not included in the application may be withdrawn on filing certified copies of the same. When the application is dismissed or discontinued the applicant may, with the consent of the court, withdraw such original muniments of title.

27. When an application is made subject to an existing mortgage or lease, executed by the applicant or some predecessor in title, the applicant shall file with the application a certified copy of the mortgage or lease, and cause the original to be presented for registration, before a decree of registration is entered.

28. The court may by general rule require facts to be stated in the application in addition to those prescribed by this act, and not inconsistent therewith, and may require the filing of any additional papers.

29. After the filing of an application, and before registration, the land therein described may be dealt with, and instruments relating thereto shall be recorded in the same manner as if no such application had been filed; but all instruments left for record relating to such land shall be indexed in the usual manner in the registry indexes, and also in the index of applications. As soon as an application is disposed of the recorder shall make a memorandum stating the disposition of the case, and shall send the same to the register of deeds for the proper district or districts, who shall record and index it with the records of deeds, and in the index of applications. If the proceedings upon the application end in a decree of registration of title the land included therein shall, as soon as the said decree is transcribed, as hereinafter provided in section forty-one, become registered land, and thereafter no deeds or other instruments relating solely to such land shall be recorded with the records of deeds, but shall be registered in the registration book and filed and indexed with the records and documents relating to registered land.

30. Immediately after the filing of an application the court shall enter an order referring it to one of the examiners of title, who shall search the records and investigate all facts stated in the application, or otherwise brought to his notice, and file in the case a report thereon, concluding with a certificate of his opinion upon the title. The recorder shall give notibe to the applicant of the filing of such report. If the opinion of the examiner is adverse to

the applicant be shall be allowed by the court a reasonable time in which to elect to proceed further or to withdraw his application. The election shall be made in writing and filed with the recorder.

31. If, in the opinion of the examiner, the applicant has a good title as alleged, and proper for registration, or, if the applicant after an adverse opinion of the examiner, elects to proceed further, the recorder shall, immediately upon the filing of the examiner's opinion, or the applicant's election, as the case may be, cause notice of the filing of the application to be published by the recorder in some newspaper published in the district where any portion of the land lie. The notice shall be issued by the order of the court, attested by the recorder, and shall be in form substantially as follows:

REGISTRATION OF TITLE.

SUFFOLK ss. COURT OF REGISTRATION.

To (here insert the names of all persons known to have an adverse interest, and the adjoining owners and occupants, so far as known), and to all whom it may concern:

WHEREAS an application has been presented to said court by (name or names and address in full) to register and confirm his (or their) title in the following described land (insert description).

You are hereby cited to appear at the Court of Registration to be held at , in said county of on the day of A. D., at o'clock in the forenoon, to show cause, if any you have, why the prayer of said application should not be granted. And unless you appear at said court at the time and place aforesaid your default will be recorded, and the said application will be taken as confessed, and you will be forever barred from contesting said application or any decree entered thereon.

WITNESS Esquire, judge of said court, this day of in the year eighteen hundred and ninety-

Attest:

Recorder.

32. The return day of said notice shall be not less than twenty nor more than sixty days from the date of issue. The court shall also, within seven days after publication of said notice in a newspaper, cause a copy of the same to be mailed by the recorder to every person named therein whose address is known. The court shall also cause a duly attested copy of the notice to be posted in a conspicuous place on each parcel of land included in the application, by a sheriff or deputy sheriff, fourteen days at least before the return day thereof, and his return shall be conclusive proof of such service. If the applicant requests to have the line of a public way determined the court shall order notice to be given by the recorder, by mailing a registered letter to the mayor of the city or to one of the selectmen of the town or towns in which the land lies, or, if the way is a highway, to one of the county commissioners of the county or counties in which the land lies. If the land borders on a river, navigable stream or shore, or on an arm of the sea where a river or harbor line has been established, or on a great pond, or if it other-

wise appears from the application or the proceedings that the Commonwealth may have a claim adverse to that of the applicant, notice shall be given in the same manner to the attorney-general. The court may also cause other or further notice of the application to be given in such manner and to such persons as it may deem proper.* The certificate of the recorder that he has served the notice as directed by the court, by publishing or mailing, shall be filed in the case before the return day, and shall be conclusive proof of such service.

33. Upon the return day of the notice, and proof of service of all orders of notice issued, the court may appoint a disinterested person to act as guardian ad litem for minors, and for all persons not in being † who may have an interest. The compensation of the guardian or agent shall be determined by the court and paid as part of the expenses of the court.

34. Any person claiming an interest, whether named in the notice or not, may appear and file an answer on or before the return day, or within such further time as may be allowed by the court. The answer shall state all objections to the application, and shall set forth the interest claimed by the party filing the same, and shall be signed and sworn to by him or by some person in his behalf.

35. If no person appears and answers within the time allowed the court may at once upon motion of the applicant, no reason to the contrary appearing, order a general default to be recorded and the application to be taken for confessed. By the description in the notice, "to all whom it may concern," all the world are made parties defendant and shall be concluded by the default and order. After such default and order the court may enter a decree confirming the title of the applicant and ordering registration of the same. The court shall not be bound by the report of the examiner of title, but may require other or further proof.

36. If in any case an appearance is entered and answer filed the cause shall be set down for hearing on the motion of either party, but a default and order shall first be entered against all persons who do not appear and answer, in the manner provided in the preceding section. The court may refer the cause or any part thereof to one of the examiners of title, as master, to hear the parties and their evidence, and make report thereof to the court. His report shall have the same weight as that of a master appointed by the Superior Court in equity, and he shall proceed according to the rules of said

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*Amended by inserting the following, "The court shall, so far as it deems it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application. Notice to such persons by mail shall be by registered letter." 1900, c. 354, s. 5.

†Amended by insertion of the words, "unascertained, unknown, or out of the Commonwealth." 1899, c. 131, s. 6.

court applicable to masters, except as the same may be modified by the rules of the Court of Registration. The court may in any case before decree require a survey to be made for the purpose of determining boundaries, and may order durable bounds to be set, and referred to in the application, by amendment. The expense of survey and bounds shall be taxed in the costs of the case and may be apportioned among the parties as justice may require. If no persons appear to oppose the application such expense shall be borne by the applicant.

37. If in any case the court finds the applicant has not title proper for registration a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may withdraw his application at any time before final decree, upon terms to be fixed by the court.

38. If the court after hearing finds the applicant has title as stated in his application, and proper for registration, a decree of confirmation and registration shall be entered. Every decree of registration shall bind the land, and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the Commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description "to all whom it may concern." Such decree shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject however to the right of any person deprived of land or of any estate or interest therein by a decree of registration obtained by fraud to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest. If there is any such purchaser the decree of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal hereinbefore provided. But any person aggrieved by such decree in any case may pursue his remedy by action of tort against the applicant or any other person for fraud in procuring the decree.

39. Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be subsisting, namely:

First. Liens, claims or rights arising or existing under the laws or constitution of the United States which the statutes of this Commonwealth cannot require to appear of record in the registry.

Second. Taxes within two years after the same have been committed to the collector.

Third. Any highway, town way, or any private way laid out

der the provisions of section sixty-five of chapter forty-nine of the blic Statutes or any act in amendment thereof or in substitution refor, where the certificate of title does not state that the boundary such way has been determined.

Fourth. Any lease for a term not exceeding seven years.

Fifth. Any liability to assessment for betterments, or other sta- tory liability which may attach to land in this Commonwealth as a n prior to, or independent of, the recording or registering of any per: provided, however, that if there are easements or other rights ppurtenant to a parcel of registered land which for any reason have iled to be registered, such easements or rights shall remain so ppurtenant notwithstanding such failure, and shall be held to pass ith the land until cut off or extinguished by the registration of the rvient estate, or in any other manner.

*[*Sixth. Any conveyances, liens or other encumbrances made subsequent to the filing of the application for original registration and prior to the transcription of the decree for registration by the assistant recorder.*

Seventh. Any attachments on mesne process.]

40. Every decree of registration shall bear date of the year, day, hour and minute of its entry, and shall be signed by the recorder. It shall state whether the owner is married or unmarried, and if married the name of the husband or wife. If the owner is under disability it shall state the nature of the disability, and if a minor shall state his age. It shall contain a description of the land as finally determined by the court, and shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments and other encumbrances, including rights of husband or wife, if any, to which the land or the owner's estate is subject, and may contain any other matter properly to be determined in pursuance of this act. The decree shall be stated in a convenient form for transcription upon the certificates of title hereinafter mentioned.

41. Immediately upon the entry of the decree of registration the recorder shall send a certified copy thereof, under the seal of the court, to the register of deeds for the district or districts in which the lands lie, and the register as assistant recorder shall transcribe the decree in a book to be called the registration book, in which a leaf or leaves in consecutive order shall be devoted exclusively to each title. The entry made by the assistant recorder in this book in each case shall be the original certificate of title, and shall be signed by him and sealed with the seal of the court. All certificates of title shall be numbered consecutively, beginning with number one. The assistant recorder shall in each case make an exact duplicate of the original certificate, including the seal, but putting

* These two clauses are struck out by 1899, c. 131, s. 7.

on it the words, "Owner's duplicate certificate", and deliver
same to the owner, or to his attorney duly authorized. In case o
variance between the owner's duplicate certificate and the origi
certificate the original shall prevail. The certified copy of the dec
of registration shall be filed and numbered by the assistant record
with a reference noted on it to the place of record of the origi
certificate of title: provided, however, that when an applicat
includes land lying in more than one district the court shall ca
the part lying in each district to be described separately by me
and bounds in the decree of registration, and the recorder shall se
to the assistant recorder for each registry district a copy of
decree containing a description of the land within that district, a
the assistant recorder shall register the same and issue an owne
duplicate therefor, and thereafter for all matters pertaining to reg
tration under this act the portion in each district shall be treated
a separate parcel of land.

42. The certificate first registered in pursuance of a decree
registration in regard to any parcel of land shall be entitled in t
registration book, "Original certificate of title, entered pursuant
decree of the court of registration, dated at" (stating time and pla
of entry of decree and the number of the case). The certificat
shall take effect from the date of the transcription of the decre
Subsequent certificates relating to the same land shall be in li
form, but shall be entitled "Transfer from No. " (the number of t
next previous certificate relating to the same land), and also the word
"Originally registered" (date, volume and page of registration).

43. Where two or more persons are registered owners as t
nants in common, or otherwise, one owner's duplicate certificate ma
be issued for the whole land or a separate duplicate may be issue
to each for his undivided share.

44. A registered owner holding one duplicate certificate fo
several distinct parcels of land may surrender it, with the approv
of the court, and take out several certificates for portions thereo
So a registered owner holding separate duplicate certificates fo
several distinct parcels may surrender them, and, with like approva
take out a single duplicate certificate for the whole land, or seven
certificates for different portions thereof. Any owner subdividin
a tract of registered land into lots shall file with the recorder a pla
of such land, when applying for a new certificate or certificates, an
the court before issuing the same shall cause the plan to be verifie
and require that all boundaries, streets and passageways shall b
distinctly and accurately delineated thereon.

45. The obtaining of a decree of registration and the entry of
certificate of title shall be regarded as an agreement running with th
land, and binding upon the applicant and all his successors in tit
that the land shall be and forever remain registered land, and sub
ject to the provisions of this act and of all acts in amendment hereo

46. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.

47. The original certificate in the registration book, any copy thereof duly certified under the signature of the recorder or an assistant recorder, and the seal of the court, and also the owner's duplicate certificate, shall be received as evidence in all the courts of the Commonwealth, and shall be conclusive as to all matters contained therein, except so far as otherwise provided in this act.

48. Every certificate of title shall set forth the names of all the persons whose estates make up the estate in fee simple in the whole land, and duplicate certificates may be issued to each person, but the recorder or assistant recorder shall note in the registration book and on each duplicate, to whom such duplicate was issued.

49. The recorder, under the direction of the court, shall make and keep indexes of all applications and of all decrees of registration, and shall also index and classify all papers and instruments filed in his office relating to applications and to registered titles. The recorder shall also, under the direction of the court, cause forms of indexes and registration and entry books to be prepared for the use of the assistant recorders. The court shall prepare and adopt convenient forms of certificates of title, and shall also adopt general forms of memoranda to be used by the assistant recorders in registering the common forms of conveyance, and other instruments to express briefly their effect.

VOLUNTARY DEALING WITH LAND AFTER ORIGINAL REGISTRATION.

50. An owner of registered land may convey, mortgage, lease, charge or otherwise deal with the same as fully as if it had not been registered. He may use forms of deeds, mortgages, leases or other voluntary instruments like those now in use and sufficient in law for the purpose intended. But no deed, mortgage or other voluntary instrument, except a will and a lease for a term not exceeding seven years, purporting to convey or affect registered land, shall take effect as a conveyance or bind the land, but shall operate only as a contract between the parties, and as evidence of authority to the recorder or assistant recorder to make registration. The act of registration shall be the operative act to convey or affect the land, and in all cases under this act the registration shall be made in the office of the assistant recorder for the district or districts where the land lies.

51. Every conveyance, lien, attachment, order, decree, instrument or entry affecting registered land, which would under existing laws, if recorded, filed or entered in the registry of deeds, affect the real estate to which it relates shall, if registered, filed or entered in the office of the assistant recorder of the district where the real

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estate to which such instrument relates lies, be notice to all persons from the time of such registering, filing or entering.

52. No new certificate shall be entered or issued upon any transfer of registered land which does not divest the title in fee simple from the owner or some one of the registered owners. All interests in registered land less than an estate in fee simple shall be registered by filing with an assistant recorder the instrument creating or transferring or claiming such interest and by a brief memorandum thereof made by an assistant recorder upon the certificate of title, and signed by him. A similar memorandum shall also be made on the owner's duplicate. The cancellation or extinguishment of such interests shall be registered in the same manner.

53. Where the assistant recorder is in doubt upon any question, or where any party in interest does not agree as to the proper memorandum to be made in pursuance of any deed, mortgage or other voluntary instrument presented for registration, the question shall be referred to the court for decision, either on the certificate of the assistant recorder stating the question upon which he is in doubt, or upon the suggestion in writing of any party in interest; and the court, after notice to all parties and a hearing, shall enter an order prescribing the form of memorandum to the assistant recorder, who shall make the registration in accordance therewith.

54. Every deed or other voluntary instrument presented for registration shall contain or have indorsed upon it the full name, place of residence, and post office address of the grantee or other person acquiring or claiming an interest under such instrument, and every deed shall also state whether the grantee is married or unmarried, and if married, give the name in full of the husband or wife. Any change in the residence or post office address of such person shall be indorsed by an assistant recorder on the original instrument, on receiving a sworn statement of such change. All names and addresses shall also be entered on all certificates. Notices and process issued in relation to registered land in pursuance of this act may be served upon any person in interest by mailing the same to the address so given, and shall be binding, whether such person resides within or without the Commonwealth.

55. No new certificate of title shall be entered, and no memorandum shall be made upon any certificate of title by the recorder or any assistant recorder, in pursuance of any deed or other voluntary instrument, unless the owner's duplicate certificate is presented with such instrument, except in cases expressly provided for in this act or upon the order of the court, for cause shown, and whenever such order is made a memorandum thereof shall be entered on the new certificate of title and on the owner's duplicate. The production of the owner's duplicate certificate whenever any voluntary instrument is presented for registration shall be conclusive authority from the registered owner to the recorder or any assistant recorder to

ater a new certificate or to make a memorandum of registration in ccordance with such instrument, and the new certificate or memoandum shall be binding upon the registered owner and upon all ersons claiming under him, in favor of every purchaser for value nd in good faith: provided, however, that in all cases of registraion procured by fraud the owner may pursue all his legal and quitable remedies against the parties to such fraud, without prejulice however to the rights of any innocent holder for value of a certificate of title; and provided, further, that after the transcription of the decree of registration on the original application any subsequent registration under this act procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void. In case of the loss or theft of an owner's duplicate certificate notice shall be sent by the owner or by some one in his behalf to the assistant recorder for the district in which the land lies, as soon as the loss or theft is discovered.

56. Each assistant recorder shall keep an entry book in which he shall enter in the order of their reception all deeds and other voluntary instruments, and all copies of writs or other process filed with him relating to registered land. He shall note in such book the year, month, day, hour and minute of reception of all instruments, in the order in which they are received. They shall be regarded as registered from the time so noted, and the memorandum of each instrument when made on the certificate of title to which it refers shall bear the same date.

Every deed or other instrument, whether voluntary or involuntary, so filed with the recorder or assistant recorder, shall be numbered and indexed, and indorsed with a reference to the proper certificate of title. All records and papers relating to registered land in the office of the recorder or of any assistant recorder shall be opened to the public in the same manner as probate records are now open, subject to such reasonable regulations as the recorder, under the directions of the court, may make.

Duplicates of all deeds and voluntary instruments filed and registered may be presented with the originals, and shall be attested and sealed by the recorder or an assistant recorder, and indorsed with the file number and other memoranda on the originals, and may be taken away by the person presenting the same.

Certified copies of all instruments filed and registered may also be obtained at any time, on payment of the assistant recorder's fees.

CONVEYANCE IN FEE.

57. An owner desiring to convey in fee his registered land or any portion thereof shall execute a deed of conveyance, which the grantor or grantee may present to the assistant recorder in the district where the land lies. The grantor's duplicate certificate shall

be produced and presented at the same time. The assistant recor shall thereupon* make out in the registration book a new certific of title to the grantee, and shall prepare and deliver to him owner's duplicate certificate. The assistant recorder shall note up the original and duplicate certificates the date of transfer, the volu and page of the registration book where the new certificate is reg tered, and a reference by number to the last prior certificate. T grantor's duplicate certificate shall be surrendered, and the wo "cancelled" stamped upon it. The original certificate shall also stamped "cancelled". The deed of conveyance shall be filed a indorsed with the number and place of registration of the certific of title of the land conveyed.

58. When a deed in fee is for a part only of the land describ in a certificate of title the assistant recorder shall also enter a ne certificate and issue an owner's duplicate to the grantor for the pa of the land not included in the deed. In every case of transfer t new certificate or certificates shall include all the land described the original and surrendered certificates: provided, however, th no new certificate to a grantee of a part only of the land shall invalid by reason of the failure of the assistant recorder to enter a ne certificate to the grantor for the remaining unconveyed portion.

59. If at the time of any transfer there appears upon the regi tration book encumbrances or claims adverse to the title of t registered owner they shall be stated in the new certificate or cert ficates, exept so far as they may be simultaneously released discharged.

MORTGAGES.

60. The owner of registered land may mortgage the same b executing a mortgage deed, and such deed may be assigned, ex tended, discharged, released in whole or in part, or otherwise dea with by the mortgagee by any form of deed or instrument sufficien in law for the purpose. But such mortgage deed, and all instru ments assigning, extending, discharging and otherwise dealing wit the mortgage, shall be registered, and shall take effect upon th title only from the time of registration.

61. Resistration of a mortgage shall be made in the manne following, to wit: — The owner's duplicate certificate shall be pre sented to the assistant recorder with the mortgage deed, and he sha enter upon the original certificate of title and also upon the owner duplicate certificate a memorandum of the purport of the mortgag deed, the time of filing and the file number of the deed, and sha sign the memorandum. He shall also note upon the mortgage dee

* *The words* "in accordance with the rules and instructions of the Court" *are inserted by* 1899, c. 131, s. 8.

the time of filing and a reference to the volume and page of the registration book where it is registered.

The assistant recorder shall also, at the request of the mortgagee, make out and deliver to him a duplicate of the certificate of title, like the owner's duplicate, except that the words "Mortgagee's duplicate" shall be stamped upon it in large letters diagonally across its face. A memorandum of the issue of the morgagee's duplicate shall be made upon the original certificate of title.

62. Whenever a mortgage upon which a mortgagee's duplicate has been issued is assigned, extended or otherwise dealt with, the mortgagee's duplicate shall be presented with the instrument assigning, extending or otherwise dealing with the mortgage, and a memorandum of the instrument shall be made upon the mortgagee's duplicate certificate. When the mortgage is discharged or otherwise extinguished the mortgagee's duplicate certificate shall be surrendered and stamped "cancelled". The production of the mortgagee's duplicate certificate shall be conclusive authority to register the instrument therewith presented, subject however to all the provisions and exceptions contained in section fifty-six of this act so far as the same are applicable.

A mortgage on registered land may be discharged by the mortgagee in person on the registration book in the same manner as a mortgage on unregistered land may be discharged by an entry on the record book in the registry of deeds, and such discharge shall be attested by an assistant recorder.

63. Mortgages of registered land may be foreclosed like mortgages of unregistered land; but in case of foreclosure by entry and possession the certificate of entry required by section two of chapter one hundred and eighty-one of the Public Statutes shall be filed and registered by an assistant recorder within thirty days after the entry, in lieu of recording. After possession has been obtained by the mortgagee or his assigns, by entry or by action, and continued for the time required by law to complete the foreclosure, he or his assigns may petition the Court of Registration for the entry of a new certificate, and the court, after notice to all parties in interest, shall have jurisdiction to hear the cause, and may order the entry of a new certificate on such terms as equity and justice may require.

In case of foreclosure by action as provided in chapter one hundred and eighty-one of the Public Statutes, and by exercising the power of sale in the mortgage under the direction of the court as provided therein, a certified copy of the final decree of the court confirming the sale may be filed with the assistant recorder, after the time for appealing therefrom has expired, and the purchaser shall thereupon be entitled to the entry of a new certificate.

In case of foreclosure by exercising the power of sale without a previous decree of court the affidavit required by section eighteen of chapter one hundred and eighty-one of the Public Statutes shall

be filed and registered with the assistant recorder, in lieu of reco
ing. The purchaser at the foreclosure sale or his assigns n
thereupon at any time present the deed under the power of sale
the assistant recorder for filing and registration, and to obtain a n
certificate, the owner's duplicate certificate and the mortgagee's
plicate, if any, being first delivered up and cancelled: provide
however, that nothing contained in this act shall be construed
prevent the mortgagor or other person in interest from directly i
peaching, by bill in equity or otherwise, any foreclosure proceedin
affecting registered land, prior to the entry of a new certificate
title.

After a new certificate of title has been entered no judgment
covered on the mortgage note for any balance due thereon sh
operate to open the foreclosure or affect the title to registered la

LEASES.

64. Leases of registered land for a term of seven years or mo
shall be registered, in lieu of recording. A lessee's duplicate cer
ficate may be issued to the lessee upon his request, subject to t
provisions hereinbefore made in regard to a mortgagee's duplica
certificate, so far as the same are applicable.

TRUSTS.

65. Whenever a deed or other instrument is filed for the purpo
of transferring registered land in trust, or upon any equitable co
dition or limitation expressed therein, or for the purpose of creati
or declaring a trust or other equitable interest in such land witho
transfer, the particulars of the trust, condition, limitation or othe
equitable interest shall not be entered on the certificate; but a me
morandum thereof shall be entered by the words "in trust", or "upo
condition", or other apt words, and by a reference by number t
the instrument authorizing or creating the same. A similar me
morandum shall be made upon the duplicate certificate. The assistan
recorder shall note upon the original instrument creating or declar
ing the trust or other equitable interest a reference by number t
the certificate of title to which it relates, and to the volume an
page in the registration book where it is registered. If the instru
ment creating or declaring a trust or other equitable interest i
already recorded in the registry of deeds or of probate a certifie
copy may be filed by the assistant recorder and registered.

66. If the instrument creating or declaring a trust or othe
equitable interest contains an express power to sell, mortgage o
deal with the land in any manner, such power shall be stated in th
certificate of title by the words "with power to sell", or "wit
power to mortgage", and by apt words of description in case o
other powers. No instrument transferring, mortgaging or in an

way dealing with registered land held in trust shall be registered, unless the power thereto enabling is expressly conferred in the instrument of trust, or unless the decree of a court of competent jurisdiction on a bill for instructions or other proceeding has construed the instrument in favor of the power, in which case a certified copy of such decree may be filed with the assistant recorder, and he shall make registration in accordance therewith.

67. When a new trustee of registered land is appointed by the Supreme Judicial Court or the Superior or Probate Court, a new certificate shall be entered to him upon presentation to the assistant recorder of a certified copy of the decree and the surrender of the duplicate certificate.

68. Whoever claims an interest in registered land by reason of any implied or constructive trust shall file for registration a statement thereof with the assistant recorder. The statement shall contain a description of the land, and a reference to the number of the certificate of title and the volume and page of the registration book where it is entered. Such claim shall not affect the title of a purchaser for value and in good faith before its registration.

69. Any trustee shall have authority to file an application for registration of any land held in trust by him, unless expressly prohibited by the instrument creating the trust.

LEGAL INCIDENTS OF REGISTERED LAND.

70. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing contained in this act shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife, or from liability to attachment on mesne process or levy on execution, or from liability to any lien of any description established by law on land and the buildings thereon, or the interest of the owner in such land or buildings, or to change the laws of descent, or the rights of partition between coparceners and other cotenants, or the right to take the same by eminent domain, or to relieve such land from liability to be recovered by an assignee in insolvency under the provisions of law relating to preferences, or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this act or any amendment hereof.

ATTACHMENTS AND OTHER LIENS.

71. In every case where a writing of any description or a copy of any writ is required by law to be filed or recorded in the registry of deeds in order to create or preserve any lien, right or attachment, upon unregistered land, such writing or copy when intended to affect

registered land, in lieu of recording, shall be filed and registered in the office of the assistant recorder for the same registry district in which the land lies, and, in addition to any particulars required in such papers for recording with records of deeds, shall also, except in the case of attachment on mesne process, contain a reference to the number of the certificate of title of the land to be affected, and the volume and page of the registration book where the certificate is registered, and also, if the attachment, right or lien is not claimed on all the land in any certificate of title, a description sufficiently accurate for identification, of the land intended to be affected.

72. In every case where an attachment or other lien or adverse claim of any description is registered, and the duplicate certificate is not presented at the time of registration to the assistant recorder, he shall within twenty-four hours thereafter send notice by mail to the registered owner, stating that such paper has been registered, and requesting him to send or produce his duplicate certificate in order that a memorandum of the attachment, or other lien or adverse claim may be made thereon. If the owner neglects or refuses to comply within a reasonable time the assistant recorder shall suggest the fact to the court, and the court after notice shall enter an order to the owner to produce his certificate at a time and place to be named therein, and may enforce the order by suitable process.

73. Attachments on mesne process and liens of every description upon registered land shall be continued, reduced, discharged and dissolved by any method sufficient in law to continue, reduce, discharge or dissolve like liens on unregistered land. All certificates or other instruments which are permitted or required by law to be recorded in the registry of deeds to give effect to the continuance, reduction, discharge or dissolution of attachments or other liens upon unregistered lands, or to give notice of such continuance, reduction, discharge or dissolution, shall in the case of like liens upon registered land be filed with the assistant recorder and registered in the registration book, in lieu of recording.

74. All the provisions of law now in force relating to attachments of real estate and leasehold estates on mesne process shall apply to registered land, except that the duties required to be performed by the register of deeds shall be performed by the assistant recorder for the registry district where the land lies, who, in lieu of recording, shall register the facts now required to be recorded, and for that purpose shall keep books similar to those now required to be kept for attachments by registers of deeds, and the fees for registering attachments shall be the same as are now provided for recording.

75. The name and address of the plaintiff's attorney shall in all cases be indorsed upon the writ, where an attachment is made, and he shall be deemed to be the attorney of the plaintiff until written

notice that he has ceased to be such shall be filed for registration by the plaintiff.

76. Whenever an attachment on mesne process is continued, reduced, dissolved or otherwise affected by an order, decision or judgment of the court in which the action or proceeding in which said attachment was made is pending, or by any order of a court of insolvency, a certificate of the entry of such order, decision or judgment from the clerk or register and under the seal of the court, shall be entitled to be registered on presentation to the assistant recorder. A like certificate of the allowance by the court of an amendment which a subsequent attaching creditor or purchaser contends had the effect of dissolving an attachment, may be registered as an amendment allowed, but shall not be conclusive of dissolution, unless the court in which the action or suit is pending adjudicates that the amendment dissolved the attachment, in which case a certificate of the order, as soon as it becomes absolute, shall be registered as a dissolution of the attachment.

77. When a mechanic's lien or lien for labor and materials is claimed upon registered and unregistered land, and the original statement required by section six of chapter one hundred and ninety-one of the Public Statutes and amendments thereof is deposited with the register of deeds and recorded, an attested copy of such statement shall be filed with the assistant recorder and registered.

78. A lien of any description upon registered land shall be enforced in the same manner as like liens upon unregistered land. Whenever registered land is set off or sold on execution; or taken or sold for taxes, or for any assessment; or sold to enforce a lien for labor or materials; or the lien of a mortgagee or cotenant arising from a payment of taxes; or for an assessment under sections eleven to thirteen of chapter fifty-one of the Public Statutes or any act in amendment thereof; or for costs and charges for taking down dangerous structures under section seventeen of chapter four hundred and eighty-one of the acts of the year eighteen hundred and ninety-four or any act in amendment thereof; or for erecting fences along the line of a railroad corporation under section one hundred and sixteen of chapter one hundred and twelve of the Public Statutes; or for improving meadows and swamps under sections four to seven of chapter one hundred and eighty-nine of the Public Statutes; or for flowing land under section twenty-two of chapter one hundred and ninety of the Public Statutes; or for any costs and charges incident to such liens; any execution, or copy of the execution, any officer's return, or any deed, demand, certificate or affidavit or other instrument made in the course of proceedings to enforce such liens and required by law to be recorded in the registry of deeds in the case of unregistered land, shall be filed with the assistant recorder for the district where the land lies, and registered in the registration

book, and a memorandum made upon the proper certificate of title in each case as an adverse claim or encumbrance.

79. Upon the expiration of the time allowed by law for redemption after registered land has been set off or sold on any execution, or taken or sold for the enforcement of any lien of any description, the person claiming under an execution, or under any deed or other instrument made in the course of proceedings to levy such execution or enforce any lien, may petition the court for the entry of a new certificate to him, and the application may be granted: provided, however, that every new certificate entered under this section shall contain a memorandum of the nature of the proceeding on which it is based; and provided, further, that where a new certificate is entered in pursuance of any tax title such certificate shall contain a memorandum that it is subject to the rights of redemption reserved in sections fifty-seven and seventy-six of chapter three hundred and ninety of the acts of the year eighteen hundred and eighty-eight or any acts in amendment thereof or in substitution therefor, and provided, further, that at any time prior to the entry of a new certificate the registered owner may pursue all his legal and equitable remedies to impeach or annul proceedings under executions or to enforce liens of any description.

PENDING SUITS, JUDGMENTS, DECREES AND PARTITIONS.

80. No writ of entry, petition for partition, or other action at law, or any proceeding in equity affecting the title to real estate or the use and occupation thereof or the buildings thereon, and no judgment or decree, nor any writ of error, bill of review or other proceeding to vacate or reverse any judgment or decree, shall have any affect upon registered land as against persons other than the parties thereto, unless a memorandum like that described in section thirteen of chapter one hundred and twenty-six of the Public Statutes and amendments thereof, containing also a reference to the number of the certificate of title of the land affected, and the volume and page of the registration book where it is entered, shall be filed and registered. This section shall not apply to attachments, levies of execution, or to proceedings for the probate of wills, or for administration, in the probate court; provided, however, that in case notice of the pendency of the action has been duly registered it shall be sufficient to register the judgment or decree in such action within sixty days after the rendition thereof.

81. At any time after final judgment or decree in favor of the defendant, or other disposition in the manner specified in section fourteen of chapter one hundred and twenty-six of the Public Statutes, of any case in which the memorandum has been registered as provided in the preceding section, a certificate of the clerk stating the

manner of disposal thereof, as provided in said section fourteen, shall be entitled to registration.

82. Whenever in any real action affecting registered land judgment is entered for the plaintiff or demandant, except in actions of ejectment and actions under chapter one hundred and seventy-five of the Public Statutes, relating to terms of less than seven years, such judgment shall be entitled to registration on presentation of a certificate of the entry thereof from the clerk of the court where the action is pending, to the assistant recorder, who shall enter a memorandum upon the certificate of title of the land to which such judgment relates. If the judgment does not apply to all the land described in the certificate of title the certificate of the clerk and the memorandum entered by the assistant recorder shall contain a description of the land affected by the judgment.

83. When in any writ of entry an execution or writ of seisin has been issued and served by the officer he shall cause an attested copy of the execution, with a return of his doings thereon, to be filed and registered within three months after the service and before the return of the execution into the clerk's office, and the demandant, in case the judgment was that he was entitled to an estate in fee simple in the demanded premises, or in any part thereof, and for which execution issued, shall thereupon be entitled to the entry of a new certificate of title: provided, that in informations under chapter one hundred and eighty-two of the Public Statutes the Commonwealth shall be entitled to have the certificate of the registered owner cancelled by the Court of Registration as soon as judgment is rendered in its favor.

84. When in a writ of dower judgment is entered confirming the report of the commissioners under section seven of chapter one hundred and seventy-four of the Public Statutes, or when in a writ of waste judgment is entered that the plaintiff recover the place wasted, a certificate of the entry of such judgment may be registered as an encumbrance.

85. Any decree of a court of equity affecting title or rights in registered land, whether made in the exercise of general equity jurisdiction, or in the exercise of jurisdiction conferred by statute for the quieting of titles or removing clouds from titles, as in chapter two hundred and thirty-seven of the acts of the year eighteen hundred and eighty-two, chapter two hundred and eighty-three of the acts of the year eighteen hundred and eighty-five, chapter four hundred and forty-two of the acts of the year eighteen hundred and eighty-nine, and chapter three hundred and forty of the acts of the year eighteen hundred and ninety-three, or for any similar purpose, may be registered in the same manner as a judgment at law. But every court of equity passing such a decree shall, upon application of the plaintiff or petitioner, order any parties before it to execute for registration any deed or instrument necessary to give effect to its decree, and

may require the registered owner to deliver his duplicate certificate to the plaintiff or petitioner to be cancelled or to have a memorandum entered upon it by the assistant recorder. In case the person required to execute any deed or other instrument necessary to give effect to the decree is absent from the Commonwealth, or is a minor, or insane, or for any reason not amenable to the process of the court, the court may appoint some suitable person a trustee to execute such instrument, and the same when executed shall be registered and shall have full force and effect to bind the land to be affected thereby.

86. In all proceedings for partition of registered land, or for the assignment in fee of registered land claimed by husband or wife by statutory right, after the entry of the final judgment or decree of partition and the acceptance of the report of the commissioners, a copy of the judgment or decree and of the return of the commissioners, certified by the clerk or register, as the case may be, shall be filed and registered; and thereupon, in case the land is set off to the owners in severalty, any owner shall be entitled to have a certificate entered of the share set off to him in severalty, and to receive an owner's duplicate therefor. In case the land is ordered by the court to be sold the purchaser or his assigns shall be entitled to have a certificate of title entered to him or them on presenting the deed of the commissioners for registration: provided, however, that any new certificate entered in pursuance of partition proceedings, whether by way of set off or of sale, shall contain a reference to the final judgment or decree of partition, and shall be conclusive as to the title to the same extent and against the same persons as such judgment or decree is made conclusive by the statutes applicable thereto; and provided, also, that any person holding such certificate of title or a transfer thereof shall have the right to petition the court at any time to cancel the memorandum relating to such judgment or decree, and the court, after notice and hearing, may grant the application. Such certificate shall thereafter be conclusive in the same manner and to the same extent as other certificates of title.

87. When a certified copy of a judgment or decree for partition and of the return of the commissioners is presented for registration, if a mortgage or lease affecting a specific portion or an undivided share of the premises had previously been registered, the tenant claiming under the mortgagor or lessor shall cause the mortgage or lease and any duplicate certificate of title issued to the mortgagee or lessee to be again presented for registration, and the assistant recorder shall indorse on each a memorandum of such partition, with a description of the land set off in severalty on which such mortgage or lease remains in force. Such tenant shall not be entitled to receive his own duplicate certificate of title until such mortgage or lease has been so presented for registration.

INSOLVENCY.

88. It shall be the duty of the messenger to register notice of the issuing of a warrant in insolvency against a debtor who is an owner of registered land, when the same is committed to him, by filing a copy thereof with the assistant recorder.

An assignee in insolvency shall be entitled to the entry of a new certificate of registered land of the debtor upon presenting and filing a certified copy of the assignment, with the insolvent's duplicate certificate of title; but the new certificate shall state that it is entered to him as assignee in insolvency.

89. Whenever proceedings in insolvency against a registered owner of which notice has been registered are vacated by decree, or when the court of insolvency grants a discharge and orders a reconveyance of land to an insolvent debtor in proceedings under chapter two hundred and thirty-six of the acts of the year eighteen hundred and eighty-four and acts in amendment thereof, a certified copy of the decree, or of such discharge and order, may be filed and registered. If a new certificate has been entered to the assignee in insolvency as registered owner the debtor shall be entitled to the entry of a new certificate to him, and the certificate of the assignee shall be surrendered.

EMINENT DOMAIN.

90. Whenever any land of a registered owner, or any right or interest therein, is taken by eminent domain, the Commonwealth or body politic or corporate or other authority excercising such right shall file for registration in the proper registry district a description of the registered land so taken, giving the name of each owner thereof, referring by number and place of registration in the registration book to each certificate of title, and stating what estate or interest in the land is taken, and for what purpose. A memorandum of the right or interest taken shall be made on each certificate of title by the assistant recorder, and where the fee simple is taken a new certificate shall be entered to the owner for the land remaining to him after such taking. In any case where the owner has a lien upon the land taken for his damages it shall be so stated in the memorandum of registration. All fees on account of any memorandum of registration or entry of new certificates shall be paid by the Commonwealth or body politic or corporate or other authority taking the land.

91. When for any reason, by operation of law, land which was taken for public use reverts to the owner from whom it was taken or to his heir or assigns, the court upon the petition of the person entitled to the benefit of the reversion, after notice and hearing, may order the entry of a new certificate of title to him.

TRANSFER BY DESCENT AND DEVISE.

92. Upon the death of a registered owner his heirs at law or devisees on the expiration of thirty days after the entry of a decree of the Probate Court granting letters testamentary or of administration, or in case of an appeal from such a decree, at any time after the entry of a final decree, may file a certified copy of the final decree of the Probate Court and of the will, if any, with the assistant recorder, and make application for the entry of a new certificate. The court shall issue notice to the executor and administrator and all other persons in interest, and may also give notice by publication in such newspaper or newspapers as it may deem proper, to all whom it may concern, and after hearing may direct the entry of a new certificate or certificates to the person or persons entitled as heirs or devisees. Any new certificate so entered before the final settlement of the estate of the deceased owner in the Probate Court shall state expressly that it is entererd by transfer from the last certificate by descent or devise, and that the estate is in process of settlement. After the final settlement of the estate in the Probate Court, or after the expiration of the time allowed by law for bringing an action against an executor or administrator by creditors of the deceased, the heirs at law or devisees may petition the court for an order to cancel the memorandum upon their certificate, stating that the estate is in course of settlement, and the court, after notice and hearing, may grant the petition: provided, however, that the liability of heirs or devisees of registered land for claims against the estate of the deceased shall not in any way be diminished or changed.

93. Nothing contained in this act shall in any way affect or impair the jurisdiction of the Probate Court to license an executor or administrator or guardian to sell or mortgage registered land for any purpose for which a license may be granted in the case of unregistered land. The purchaser or mortgagee taking a deed excecuted in pursuance of such license shall be entitled to a new certificate of title, or memorandum of registration, on presenting his deed to the assistant recorder.

ASSURANCE FUND.

94. Upon the original registration of land under this act, and also upon the entry of a certificate showing title as registered owners in heirs or devisees, there shall be paid to the recorder one tenth of one per cent. of the assessed value of the real estate, on the basis of the last assessment for municipal taxation, as an assurance fund.

95. All money received by the recorder under the preceding section shall be paid to the treasurer of the Commonwealth. He shall keep the same invested, with the advice and approval of the governor and council, and shall report annually to the general court the condition and income thereof.

96. Any person who without negligence on his part sustains loss or damage, or is deprived of land or of any estate or interest therein after the original registration of land under this act, by the registration of any other person as owner of such land or of any estate or interest therein, through fraud or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry or memorandum in the registration book, may bring and prosecute an action of contract in the Superior Court for the recovery of compensation for such loss or damage or for such land or estate or interest therein from the assurance fund: provided, however, that where the person deprived of land or of any estate or interest therein in the manner above stated has right of action or other remedy for the recovery of the land or of the estate or interest therein, he shall exhaust such right of action or other remedy before resorting to the action of contract herein provided; and provided, further, that nothing in this act shall be construed to deprive the plaintiff of any action of tort which he may have against any person for such loss or damage, or deprivation of land or of any estate or interest therein. But if the plaintiff elects to pursue his remedy in tort, and also brings an action of contract under this act, the action of contract shall be continued to await the result of the action of tort.

97. If such action of contract is brought to recover for loss or damage or for deprivation of land or of any estate or interest therein, arising wholly through any fraud, negligence, omission, mistake or misfeasance of the recorder, assistant recorder or of any of the examiners of title, in the performance of executive or ministerial duties, or of any of the assistants or clerks of the recorder, in the performance of their respective duties, then the action shall be brought against the treasurer of the Commonwealth as sole defendant.

If such action is brought to recover for loss or damage or deprivation of land or of any estate or interest therein arising wholly through any fraud, negligence, omission, mistake or misfeasance of some person or persons other than the recorder, assistant recorder or the other officers and assistants above named, or arising jointly through the fraud, negligence, omission, mistake or misfeasance of such other person and the recorder, assistant recorder or other officers and assistants above named, then such action shall be brought against both the treasurer of the Commonwealth and such other person or persons, as joint defendants.

98. Where there are defendants other than the treasurer of the Commonwealth, and where judgment is entered for the plaintiff against the treasurer and against some or all of the other defendants, execution shall issue against the other defendants and be levied upon them. If the execution is returned unsatisfied in whole or in part, and the officer returning the same certifies that the amount due cannot be collected from the lands or goods of such other defendants, a justice of the Superior Court shall direct the clerk to certify to the

governor the amount due on the execution, and the governor shall draw his warrant therefor upon the treasurer of the Commonwealth, and the treasurer shall pay the amount out of the assurance fund without any further act or resolve making an appropriation therefor.

When in such action judgment for any reason cannot be entered against all or any of the other defendants it may be entered against the treasurer alone or against the treasurer and such of the other defendants as are found to be liable, and against whom judgment may lawfully be entered. Whenever judgment is entered against the treasurer of the Commonwealth alone, whether in a case where he is sole defendant or joint defendant with others, the justice of the Superior Court before whom the action is tried shall direct the clerk to transmit to the governor a certificate of the entry of judgment and of the amount due, and the treasurer shall pay the same upon the warrant of the governor, as above provided.

99. If the assurance fund at any time is not sufficient to meet the amount called for by such warrant of the governor the treasurer shall make up the deficiency from any funds in the treasury not otherwise appropriated; and in such case any sums thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury, until the amount paid on account of the deficiency shall have been made up.

100. In every case where payment has been made by the treasurer of the Commonwealth under warrant from the governor the Commonwealth shall be subrogated to all rights of the plaintiff against any other parties or securities, and the treasurer shall enforce the same in behalf of the Commonwealth. Any sums so recovered by the treasurer shall be paid into the treasury of the Commonwealth to the account of the assurance fund.

101. The income of the assurance fund shall be added to the principal and invested, until said fund amounts to the sum of two hundred thousand dollars, and thereafter the income of such fund shall be used to defray, as far as may be, the expenses of the administration of this act, instead of being added to the fund and accumulated.

102. The assurance fund shall not be liable to pay for any loss damage or deprivation occasioned by a breach of trust, whether express, implied or constructive, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage. Nor shall any plaintiff recover as compensation in an action of contract under this act more than the fair market value of the real estate at the time of the last payment to the assurance fund on account of the same real estate.

103. All actions of contract for compensation under this act by reason of any loss or damage or deprivation of land or any estate or interest therein shall be begun within the period of six years from the time when the cause of action accrued, and not afterwards:

provided, however, that the plaintiff in an action for the recovery of the land or estate or interest therein in accordance with section ninety-seven of this act may bring the action of contract for compensation within one year after the termination of such action; and provided, further, that the action of contract herein provided shall survive to the personal representative of the registered owner, unless barred in his lifetime, but the proceeds thereof shall be treated as real estate.

POWERS OF ATTORNEY.

104. Any person may by attorney procure land to be registered and convey or otherwise deal with registered land, but the letters of attorney shall be acknowledged and filed with the recorder or the assistant recorder of the proper registry district, and registered. Any instrument revoking such letters shall be acknowledged and registered in like manner.

LOST DUPLICATE CERTIFICATES.

105. If a duplicate certificate is lost or destroyed, or cannot be produced by a grantee, heir, devisee, assignee or other person, applying for the entry of a new certificate to him or for the registration of any instrument, a suggestion of the fact of such loss or destruction may be filed by the registered owner or other person in interest and registered. The court may thereupon, upon the petition of the registered owner or other person in interest, after notice and hearing, direct the issue of a new duplicate certificate, which shall contain a memorandum of the fact that it is issued in place of a lost duplicate certificate, but shall in all respects be entitled to like faith and credit as the original duplicate, and shall thereafter be regarded as the original duplicate for all the purposes of this act.

ADVERSE CLAIMS.

106. Whoever claims any right or interest in registered land adverse to the registered owner arising subsequent to the date of original registration may, if no other provision is made in this act for registering the same, make a statement in writing setting forth fully his alleged right or interest, and how or under whom acquired, and a reference to the volume and page of the certificate of title of the registered owner, and a description of the land in which the right or interest is claimed. The statement shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place at which all notices may be served upon him. This statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the question of the validity of such adverse claim, and shall enter such decree thereon as justice and equity may require. If the

claim is adjudged to be invalid the registration shall
If in any case the court after notice and hearing shal
claim thus registered was frivolous or vexatious it
adverse claimant double costs.

SURRENDER OF DUPLICATE CERTIFICATES.

107. In every case where the recorder or any assis
is requested to enter a new certificate in pursuance o
ment purporting to be executed by the registered ow
reason of any instrument or proceedings which divest
the registered owner agains this consent, if the outstan
duplicate certificate is not presented for cancellation
request is made, the recorder or assistant recorder shall
new certificate, but the person claiming to be entitled t
apply by petition to the court. The court, after hearing
the registered owner or any person withholding the du
tificate to surrender the same, and direct the entry of a
cate upon such surrender.

If in any case the person withholding the duplicate c
not amenable to the process of the court, or if for any
outstanding owner's duplicate certificate cannot be delive
court may by decree annul the same, and order a new c
title to be entered. Such new certificate and all duplica
shall contain a memorandum of the annulment of the o
duplicate.

If in any case an outstanding mortgagee's or lessee's
certificate is not produced and surrendered when the m
discharged or extinguished or the lease is terminated, lik
ings may be had to obtain registration as in the case of
production of an owner's duplicate.

AMENDMENT AND ALTERATION OF CERTIFICATES OF T

108. No erasure, alteration or amendment shall be m
the registration book after the entry of a certificate of tit
memorandum thereon and the attestation of the same by th
or an assistant recorder, except by order of the court. A
tered owner or other person in interest may at any time
petition to the court, upon the ground that registered in
any description, whether vested, contingent, expectant or
have terminated and ceased; or that new interests have arise
created which do not appear upon the certificate; or that a
omission or mistake was made in entering a certificate or
morandum thereon, or on any duplicate certificate; or that
of any person on the certificate has been changed; or that t
tered owner has been married, or if registered as married
marriage has been terminated; or that a corporation whi

registered land and has been dissolved has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court shall have jurisdiction to hear and determine the petition after notice to all parties in interest, and may order the entry of a new certificate, the entry or cancellation of a memorandum upon a certificate, or grant any other relief upon such terms and conditions, requiring security if necessary, as it may deem proper: provided, however, that this section shall not be construed to give the court authority to open the original decree of registration, and that nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs or assigns, without his or their written consent.

Any petition filed under this section and all petitions and motions filed under the provisions of this act after original registration shall be filed and entitled in the original case in which the decree of registration was entered.

SERVICE OF NOTICES AFTER REGISTRATION.

109. All notices required by or given in pursuance of the provisions of this act by the recorder or any assistant recorder, after original registration, shall be sent by mail to the person to be notified at his residence and post office address as stated in the certificate of title, or in any registered instrument under which he claims an interest, in the office of the recorder or assistant recorder, relating to the parcel of land in question.

All notices and citations directed by special order of the court under the provisions of this act, after original registration, may be served in the manner above stated, and the certificate of the recorder shall be conclusive proof of such service: provided, however, that the court may in any case order different or futher service, by publication or otherwise.

FEES FOR REGISTRATION.

110. The fees payable under this act shall be as follows:

For every application to bring land under this act, including indexing and recording the same, and transmitting to recorder, when filed with assistant recorder, three dollars.

For every plan filed, seventy-five cents.

For indexing an instrument recorded while application for registration is pending, twenty-five cents.

For examining title, five dollars, and one tenth of one per cent. of the value of the land.

For each notice by mail, twenty-five cents, and the actual cost of printing.

For all services by a sheriff under this act, the same fees now provided by law for like services.

For each notice by publication, twenty-five cents, and the cost of publication.

For entry of order dismissing application, or decree of regis and sending memorandum to assistant recorder, one dollar.

For copy of decree of registration, one dollar.

For entry of original certificate of title and issuing one du certificate, three dollars.

For making and entering a new certificate of title includin of one duplicate certificate, one dollar.

For each additional duplicate certificate, after the first, fifty

For the registration of every instrument, whether single duplicate or triplicate, including entering, indexing and filing and attesting registration thereof, and also making and attestin of memorandum on one instrument or on a duplicate certificate required, one dollar and fifty cents.

For making and attesting copy of memorandum on each tional instrument or duplicate certificate if required, fifty cents

For filing and registering an adverse claim, three dollars.

For entering statement of change of residence or post-office ad including indorsing and attesting same on a duplicate certi twenty-five cents.

For entering any note in the entry book or in the regist book, twenty-five cents.

For the registration of a suggestion of death or notice of is a warrant in insolvency, twenty-five cents.

For the registration of a discharge or release of mortgage or instrument creating an encumbrance, fifty cents.

For the registration of a memorandum or certificate of ent possession or deposition in proof thereof, fifty cents.

For the registration of any levy, or of any discharge or di tion of any attachment or levy, or of any certificate of or re for payment of taxes, or of any mechanic's lien or lien for lab materials, or notice of any pending action or of a judgment cree, fifty cents.

For indorsing on any mortgage, lease or other instrument a m randum of partition, one dollar.

For every petition filed under this act after original registra one dollar.

For a certified copy of any decree or registered instrument same fees as are provided by law for registers of deeds.

In all cases not expressly provided for by law, the fees of all lic officers for any official duty or service under this act shall the same rate as those prescribed herein for like services.

PENALTIES.

111. Certificates of title and duplicate certificates issued under this act shall be subjects of larceny.

112. Whoever knowingly swears falsely to any statement required to be made under oath by this act shall be guilty of perjury, and liable to the statutory penalties for perjury.

113. A certificate of title, duplicate certificate of title, certificate issued in place of a duplicate certificate, the registration book, entry book, and all indexes provided for by this act, and the docket of the recorder, shall be treated as if specifically described and enumerated in section one of chapter two hundred and four of the Public Statutes, and the various acts therein described, when done in reference to the records or instruments hereinbefore mentioned, shall be punished as provided in said section and chapter.

114. Whoever forges or procures to be forged, or assists in forging, the seal of the Court of Registration, or stamps or procures to be stamped, or assists in stamping, any document with such forged seal, or with the genuine seal of the Court of Registration without being duly authorized thereto, shall be punished by imprisonment in the state prison not exceeding ten years, or in the jail not exceeding two years.

115. Whoever, with intent to defraud, sells and conveys registered land knowing that an undischarged attachment or any other encumbrance exists thereon which is not noted by memorandum on the duplicate certificate of title, without informing the grantee of such attachment or other encumbrance before the consideration is paid, shall be punished by imprisonment in the state prison not exceeding three years, or in the jail not exceeding one year.

116. This act shall take effect upon the first day of October in the year eighteen hundred and ninety-eight. [*Approved June 23, 1898.*